Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

1. IS THE RULING OF A DISTRICT COURT ON WHETHER A STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF HAS AUTHORIZED A HAEAS CORPUS PETITION SUBJECT TO THE "COLLATERAL ORDER" APPEAL DOCTRINE IN COHEN V. BENEFICIAL LOAN CORP., 337 U.S. 541 (1949)?

2. IS SUCH A PETITION AUTHORIZED UNDER 28 U.S.C. § 2242 WHERE THE PRISONER DISAVOWS IT?

LIST OF PARTIES

1. Arthur Calderon, Warden of the California State Prison at San Quentin, Petitioner.

2. Douglas Daniel Clark, Respondent.

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	4
SUMMARY OF REASONS FOR GRANTING THE WRIT	8
ARGUMENT	11
I. AN ORDER DETERMINING WHETHER A STATE PRISONER HAS, UNDER 28 U.S.C. § 2242, "AUTHORIZED" A PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE APPEALABLE IMMEDIATELY	11
II. AN INDIGENT STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF BEING REPRESENTED BY STATUTORILY APPOINTED COUNSEL HAS FINAL AUTHORITY OVER THE CLAIMS RAISED IN AND EXCLUDED FROM HIS FEDERAL HABEAS CORPUS PETITION	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Page
Abney v. United States, 431 U.S. 651 (1977)	16
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	14
Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991)	11
Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)	16,18
Ford v. Lockhart, 861 F.Supp. 1447 (E.D. - Ark. 1994)	12
Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	13,14
Cohen V. Beneficial Loan Corp., 337 U.S. 541 (1949)	15
Jones v. Barnes, 463 U.S. 745 [103 S.Ct. 3308, 77 L.Ed.2d 987] (1983)	21
Mitchell v. Forsyth, 472 U.S. 511 (1985)	16

TABLE OF AUTHORITIES, CONT'D

Murray v. Carrier,
477 U.S. 527
[106 S.Ct. 2661, 91 L.Ed.2d 434] (1986) 17

Prate v. Freedman,
583 F.2d 42 (2nd Cir. 1978) 21

President of the United States,
Nixon v. Fitzgerald,
457 U.S. 731 (1982) 16

Puerto Rico Aqueduct & Sewer Authority
v. Metcalf and Eddy, Inc., 506 U.S. 139 (1993) 16

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424 (1985) 17

Speech and Debate Clause,
Helstoski v. Meanor,
442 U.S. 500 (1979) 16

Stack v. Boyle,
342 U.S. 1 (1951) 16

Ex Parte Tom Tong,
108 U.S. 556 [2 S.Ct. 871, 27 L.Ed. 826] (1883) 21

United States v. McDonald,
435 U.S. 850 (1978) 16

TABLE OF AUTHORITIES, CONT'D

Statutes

21 U.S.C. § 848	21,22
28 U.S.C. § 1254	22
28 U.S.C. § 1291	13
28 U.S.C. § 2242	11,12
28 U.S.C. § 2254	12

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OPINION OR JUDGMENT BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, filed March 6, 1998, amending a January 22, 1998 Order denying and dismissing petitioner's collateral order appeal and otherwise denying petitioner's petition for rehearing. See Appendix[1/] A.

The original Order of the United States Court of Appeals for the Ninth Circuit, filed January 22, 1998, denying and dismissing the appeal. See Appendix B.

The Order of the United States District Court for the Central District of California, filed July 31, 1997, denying petitioner's motion to dismiss respondent's

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1. The appendices are being filed concurrently under separate cover.

petition for writ of habeas corpus or, in the alternative, to compel full verification. See Appendix C.

STATEMENT OF JURISDICTION

The date of the Order which petitioner seeks to have reviewed is March 6, 1998. See Appendix A.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

28 U.S.C. § 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2242:

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the application is held.

21 U.S.C. § 848(q)(4)(B):

In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Respondent Douglas Daniel Clark, hereinafter Clark, a death row inmate in the custody of petitioner Arthur Calderon, Warden of the California State Prison at San Quentin, hereinafter the Warden, was convicted on March 16, 1983, in a California state court by a Los Angeles County jury of the first-degree murders of six women in a series of killings that became known as the "Sunset slayings." The jury fixed the penalty at death.

On July 30, 1992, the California Supreme Court affirmed the judgment and death penalty. This court denied certiorari on March 22, 1993.

Clark requested appointment of counsel on November 3, 1992 and counsel was appointed on February 7, 1994 by United States District Court Judge Robert M. Takasugi. On April 23, 1997, appointed counsel filed, purportedly on Clark's behalf, a petition for writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254 (see Appendix D), seeking to overturn his convictions and death sentences based on 27 different claims for relief.

The petition bore what purported to be Clark's signature. However, as part of the petition, the then-appointed counsel for Clark alleged that counsel himself, instead of Clark personally, had verified claims sixteen through twenty seven because, "At this time, [Clark] is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief." There appeared to be some question as to whether Clark's signature had been attached to a version of the petition which he had not seen and 1) which contained a different version of claims one through fifteen, to which he

had consented, and 2) to which was reattached claims sixteen through twenty seven, which Clark had ordered his counsel to remove from the original petition he had been shown when he signed the verification page.

On May 21, 1997, the Warden filed a "Notice of Motion and Motion to Dismiss Petition as Unauthorized, or, in the Alternative to Compel Full Verification by [Clark]." See Appendix E. In his motion, the Warden contended that the petition had openly heralded the fact that it was not personally authorized by Clark and that Clark himself should therefore be compelled either to verify it personally, it should be dismissed, or Clark should verify and counsel should file a new petition upon which he and counsel both could agree.

Clark, who by this time had been granted permission by the district court judge to file documents *in propria persona* on the authorization question, filed a document on June 10, 1997, in the district court entitled "Notice of [Clark's] Objection to Continued Representation by Appointed Counsel," (see Appendix F), and another document on June 30, 1997, entitled, "Actual Opposition to Fukioja's Perjurious Documents Filed 4-23-97 and 6-16-97" (see Appendix G). In these documents, particularly the latter, Clark stated that he was expressly disavowing the petition.

Clark's then-appointed counsel, on June 16, 1997, then filed a document entitled, "Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," (see Appendix H) arguing therein that Clark's verification of some of the claims in the petition sufficed to authorize all of the claims in the petition.

The Warden then, on June 23, 1997, filed its "Reply to Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," (see Appendix I) arguing that the state of the record, including Clark's *in propria persona* after-the-fact denunciations of the petition and the inclusion of the claims contained therein against his express wishes rendered the petition unauthorized and thus left the district court without jurisdiction to proceed thereupon.

On July 7, 1997, Clark, *in propria persona*, filed a letter (see Appendix J) criticizing both his counsel and the Warden's reply.

On July 30, 1997, the district court issued two orders. One order was entitled, "Order Granting Request to Discharge Current Counsel and Appointing Manuel Araujo as Counsel for [Clark]" (see Appendix K), and the other order was entitled, "Order Denying Motion to Dismiss Petition and Alternative Motion to Compel Full Verification by [Clark]," (see Appendix C).

In the latter order, the district court held that:

> [Clark's] verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler.

On August 27, 1997, the Warden filed a "collateral order" notice of appeal challenging the aforementioned order. See Appendix L. On September 11, 1997, the Warden filed a petition for writ of mandate and/or prohibition challenging the same order. See Appendix M. On October 1, 1997, the Warden filed a motion to consolidate the two cases (see Appendix N) and on October 21, 1997, the Ninth Circuit issued an Order

granting the consolidation of the two cases (see Appendix O).

On November 12, 1997, the Ninth Circuit Court of Appeals issued an order of denying the petition for writ of mandate/prohibition. See Appendix P. The Order in question read:

> The Petitioner's Application for Stay of the District Court Proceedings is DENIED. The petition for writ of mandamus and/or prohibition is also DENIED.

On January 22, 1998, the Ninth Circuit issued an Order (Appendix B) stating:

> The State's appeal based on the district court's collateral order is denied. The State submitted only a statement of issues and representation statement. This fails to comply with FRAP 28(a). We therefore dismiss the appeal. N/S Corp. v. Liberty Mutual Insurance Co., 127 F.3d 1145 (9th Cir. 1997). Emphasis added.

On or about February 5, 1998, the Warden filed a petition for rehearing pursuant to FRAP 40. See Appendix Q. Therein, inter alia, the Warden argued that either the Ninth Circuit was unaware that this was a death penalty case and, under local Ninth Circuit rules, the briefing schedule for such cases are set by the Court and no briefing schedule had been set, explaining why the Warden had filed no brief, or, on the other hand, the Ninth Circuit had denied the Warden's right to an appeal by deciding the case without allowing the Warden the right to brief the issue and then denying relief on the grounds that a brief had not been filed.

On March 6, 1998, the Ninth Circuit issued the Order (see Appendix A) from which this certiorari petition is taken which read:

> This Court's Order, filed January 22, 1998, is amended by substituting the following:
>
> The State's collateral order appeal is DISMISSED pursuant to Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546-47 (1949). We hold that briefs are not necessary to our decision.
>
> With this amendment made, the State's petition for rehearing is DENIED.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Warden urges that a writ of certiorari should be granted because the United States Court of Appeal for the Ninth Circuit has decided an important question of federal law of first impression that has not been, but should be, settled by this Court, i.e., that a decision by a district court that a petition for writ of habeas corpus has been authorized by a state prisoner is not subject to the "collateral order appeal" doctrine.

This High Court has never explicitly ruled that a petition for writ of habeas corpus by an indigent state prisoner must be authorized. The Ninth Circuit, and one district court in the Eighth Circuit at least, have ruled that if a first petition for writ of habeas corpus is retroactively deemed to have been "unauthorized," the state prisoner is allowed to start all over again with what would otherwise be a "second successive" petition. The States thus risk expending years of litigation defending against petitions that could potentially be declared null and void by a subsequent federal court.

Under 28 U.S.C. § 2242, every petition for writ of habeas corpus filed by a person in state custody must be "signed and verified" by the person on whose behalf relief is sought. In the instant case, the statutorily appointed counsel for the indigent inmate respondent here filed a petition that included numerous claims that the prisoner objected to and attached thereto the prisoner's verification which had been signed on an unnumbered page. When the Warden pointed out that the petition admitted that it lacked Clark's verification as to numerous claims, Clark, who apparently demanded to see a copy of the version of the petition that had actually been filed, then disavowed the version of the petition filed on the ground that it contained numerous claims to which he objected.

However, the district court ruled Clark's (apparently earlier) verification of some claims sufficed to ensure his endorsement of the habeas action.

The Warden appealed but the Ninth Circuit, either 1) expressly refused to review the issue, finding it not to be a proper one for a "collateral order appeal," or 2) summarily decided that the district court's order was correct as a matter of law.

If the Ninth Circuit's Order constituted a refusal to review the district court order, the issue here is whether the ruling of a district court that a petition for writ of habeas corpus is authorized is a ruling which should be reviewed prior to the expenditure of years of litigation. A ruling on the authorization of a petition is one which 1) is of overriding importance to the litigation, 2) does not involve the merits of the litigation, and 3) for all practical purposes is unreviewable on appeal.

On the other hand, if the Ninth Circuit's order was a ruling on the merits of the appeal, then the issue, i.e., to what extent does an indigent state prisoner being represented by appointed counsel have the right to control the claims asserted in his petition, is momentous and also a question of first impression.

ARGUMENT

I.

AN ORDER DETERMINING WHETHER A STATE PRISONER HAS, UNDER 28 U.S.C. § 2242, "AUTHORIZED" A PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE APPEALABLE IMMEDIATELY

At issue is whether the States can, without awaiting final judgment and appeal, challenge a habeas corpus petition as unauthorized. A State has an interest in the question because if it is forced into lengthy litigation on a petition, and that petition is subsequently declared null and void as being not authorized by the prisoner, the State may have to litigate a new petition, presumably one legitimately authorized by the prisoner.

This is what occurred in the case of Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991), where, on three separate occasions, the United States Supreme Court reversed the Ninth Circuit's own reversals of a death judgment. In all three instances, this Court had held that relief could not be granted the inmate because the petition was a second and therefore successive one. After the last reversal, however, the inmate, for the first time, asserted that the petition was not a second or successive petition at all because he, the petitioner, had never "authorized" the first petition. The Ninth Circuit agreed, noting that the counsel had never actually shown the petition to the inmate, and the State was forced to start the whole process again from the beginning and defend a new petition. Deutscher was dutifully followed in the

Eighth Circuit district court case of Ford v. Lockhart, 861 F. Supp. 1447, 1453 (E.D.-Ark. 1994).

It is clear that a state prisoner must consent to any petition for federal habeas corpus relief filed in his behalf. 28 U.S.C. § 2242 provides that:

> Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

In the instant case, the facts are simple. Clark, an indigent state prisoner under conviction and sentence of death, demanded that the petition filed on his behalf under 28 U.S.C. §2254 contain certain claims and exclude others. Against his wishes, his appointed counsel instead attached Clark's verification to a different version of the petition that changed the claims Clark wanted included and also included claims he wanted excluded. See Appendix D. When the Warden, Petitioner here, protested that the petition was unauthorized, raising the specter that any judgment obtained would be invalid, the state prisoner, then apparently alerted to the changes for the first time, agreed with the Warden and filed documents in the district court disavowing the whole petition. See Appendix G.

The Warden moved to dismiss the petition as unauthorized or, in the alternative, to compel the prisoner and his counsel to agree upon the contents of a single unified petition. See Appendix E. However, the district court ruled that Clark's apparent consent to some claims contained in the petition was sufficient to authorize the whole petition, even though Clark objected to the inclusion of other parts of the petition and disavowed the

whole petition because of the inclusion of the latter claims. See Appendix C.

The portion of Cohen to which the Ninth Circuit's Order (from which this certiorari petition is taken) cites decries appellate intervention as to district court orders that 1) pertain to matters that remain "open, unfinished or inconclusive, and 2) "are but steps towards final judgment [on the merits] in which they will merge." Id. However, as will be shown below, the appeal here violates neither of these two cautions.

It is clear that the appellate courts have jurisdiction over appeals "from all final decisions of the district courts." 28 U.S.C. § 1291. A final decision is typically one which ends the litigation on the merits. Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988). Although the order of the district court below denying the dismissal of the petition as unauthorized is obviously not a "final decision" in that sense, the Warden submits that it still qualifies for immediate appeal under what is sometimes called the "collateral order" exception to the final judgment requirement of 28 U.S.C. § 1291.

In Cohen, following the language apparently cited by the Ninth Circuit, the Supreme Court held that there are "a small class of decisions" which are appealable under 28 U.S.C. § 1291 even though they do not end the underlying litigation if they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Ibid.

In later decisions, the Supreme Court has articulated a three-pronged test to determine whether an order is appealable under the collateral order doctrine:

> First, the order must "conclusively determine the disputed question." Coopers & Lybrand v. Livesay, 437 U.S. [463,] 468 [(1978)]. Second, the order must "resolve an important issue completely separate from the merits of the action." Ibid. Third and finally, the order must be "effectively unreviewable on appeal from a final judgment." Ibid. (footnote omitted).

Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. at 276.

Despite the citation in the Ninth Circuit's Order to pages 546 and 547 of the Cohen opinion, the district court's action regarding whether Clark "authorized" the petition does not leave the matter of authorization "open, unfinished, or inconclusive." It clearly and conclusively allows the petition to proceed to final judgment "as is." The language of the district court order is not, by its terms, tentative. It clearly states that:

> [Clark's] verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler. Appendix C.

Certainly, the question of authorization can be reviewed on appeal after final judgment. However, it is not the ultimate appealability of the decision considered for collateral appeal that was addressed by the language in Cohen disdaining intervention in the district court's exercise of power that leaves matters "open, unfinished, or inconclusive." There, instead, this High Court referred to

disdaining intervention into any action which the district court itself has not finally resolved, such as where the district court's decision is "tentative, informal or incomplete." 337 U.S. at 546. As such, Cohen did not mean to indicate, as the Ninth Circuit has apparently misinterpreted it, that where the aggrieved party has a right to review of the issue on appeal, the collateral order appeal doctrine will not lie.

As stated above, the second caution contained in the portion of Cohen cited by the Order (from which this certiorari petition is taken) warns against intervention in matters that are "but steps towards final judgment [on the merits] in which they will merge." Id. The district court's decision that the petition is authorized, being separate and apart from the merits, still can be challenged on appeal. Indeed, the appeal in Deutscher, cited above, was taken from the district court's ruling that the prior petition had not been authorized. As such, the authorization issue will not "merge" into the final judgment.

Next, the issue here -- whether the petition is authorized and thus valid instead of being potentially null and void -- is extremely important apart from the merits of the petition. In fact, the decision could be reviewed on appeal from the final judgment although, for all practical purposes, any victory resulting from that review would be Pyrrhic. There can be no question that forcing a State to await a final judgment granting or denying the writ before seeking appellate review of the validity of the authorization of the petition would render the decision of the district court on the authorization question here "*effectively*" unreviewable. The Warden emphasizes the word "effectively" because Cohen, by using the word "effectively" in the sentence "too late effectively to review the present order," meant that the remedy must be real and not illusory. Id.

The third Cohen prong, the reviewability of the Order in question, cannot be properly analyzed "without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 878-79 (1994).

Applying that test, this Court has found appealable a violation of a criminal defendant's statutory and constitutional right to bail, Stack v. Boyle, 342 U.S. 1 (1951); an adverse ruling on a double jeopardy claim, Abney v. United States, 431 U.S. 651 (1977); an order denying immunity under the Speech and Debate Clause, Helstoski v. Meanor, 442 U.S. 500 (1979); a decision denying a civil defendant's motion to dismiss based upon absolute immunity from suit for civil damages arising from actions taken while he was President of the United States, Nixon v. Fitzgerald, 457 U.S. 731 (1982); and a ruling denying governmental officials qualified immunity from damages suits, Mitchell v. Forsyth, 472 U.S. 511 (1985).

In the situations in which collateral order appeals were taken up, this Court found compelling the fact that "each involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial." United States v. McDonald, 435 U.S. 850, 860 (1978) (footnote omitted); See also Puerto Rico Aqueduct & Sewer Authority v. Metcalf and Eddy, Inc., 506 U.S. 139, 147 (1993) (State's Eleventh Amendment immunity from suit in federal court may be vindicated by immediate appeal under collateral order doctrine).

The Warden submits that the right involved here -- the State's right to not be subjected to "unauthorized" habeas proceedings is merely the "flip side" of what the "double jeopardy" protection is to the criminal defendant. The criminal defendant has a simple right not to be

subjected to another trial at which he risks either punishment, if the first trial ended in acquittal, or additional punishment if it ended in conviction. Allowing him to appeal an adverse ruling on a "once in jeopardy" claim is not an adequate vindication of that constitutional right. Obviously, the defendant has an emotional as well as a liberty interest in not being forced to undergo an entire trial and appeal in order to have this right vindicated. It is simply not enough to rely on the fact that he can raise the jeopardy issue on appeal.

The mirror image of this claim is the State's right here. Here, there has been a conviction that has been upheld on appeal and is now final. In light of "the profound societal costs that attend the exercise of habeas jurisdiction," Murray v. Carrier, 477 U.S. 527, 539, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the State, seeking legal security in the finality of that conviction, has a right to demand that it not be forced to undergo useless federal habeas litigation simply because the Order is technically reviewable on appeal. It is the very delay in the execution of the State's laws which can be likened to forcing a defendant to undergo repeated trials and awaiting appeal for vindication. The costs occasioned by the delay to the deterrent effect of the penalty imposed are the same.

The State's right not to be forced to litigate an unauthorized habeas petition with its attendant delay -- would likewise be "irretrievably lost," see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985), if this matter were allowed to go forward without immediate review of the district court's order.

Because an unauthorized habeas petition may later be potentially considered to be void by a federal court, as in Deutscher, and, because "[a] fully litigated case can no more be untried than the law's proverbial bell

can be unrung," Digital Equip. Corp., 511 U.S. at 872, it is clear that a delayed appeal will not vindicate the Warden's rights.

In light of the foregoing, the simple fact is that, far from being a "remedy," a later determination on appeal, after years of wasted litigation, that the petition was unauthorized and all previous proceedings were for naught is what a collateral order appeal here seeks to avoid. In that event, the Warden will have already suffered the harm that the litigation here is designed to forestall, i.e., expending time and resources on litigation whose very legitimacy is in question. Thus, a later appeal from the judgment is not an "effective" remedy even if it does result in a declaration that the petition was unauthorized.

The question that might present itself is whether the authorization issue is one that will be mooted by the judgment, never ultimately helping or hurting anyone. However, such a question fails to take into account the inmate himself. Like the inmate in Deutsher, Clark personally could always challenge a petition as being unauthorized if it suited his purpose.

Obviously, if the writ were granted, the inmate would not challenge the validity of the petition. If, however, the writ were denied, or if a grant of the petition were overturned on appeal or on certiorari review, the inmate, as in Deutscher, could attempt to raise the authorization question anew by filing a new petition.

As such, the inmate would have the "best of both worlds" while the order of the district court would be "effectively unreviewable." This being true, the third requirement of Cohen, the absence of availability of realistic relief on appeal, is satisfied here.

It is clear the authorization issue is an overriding question in this litigation. It is completely separate and apart from the merits so that the appellate court cannot be said to be interfering with the district court's right to determine those issues in the first instance. Lastly, given the fact that all subsequent litigation will be wasted if the order is incorrect, this case presents the optimum one for application of the collateral order appeal doctrine.

II.

AN INDIGENT STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF BEING REPRESENTED BY STATUTORILY APPOINTED COUNSEL HAS FINAL AUTHORITY OVER THE CLAIMS RAISED IN AND EXCLUDED FROM HIS FEDERAL HABEAS CORPUS PETITION

The question here[2/] is whether, for purposes of deciding if a federal court has jurisdiction over a habeas corpus petition filed against the wishes of the petitioner, a dispute between an appointed attorney and the petitioner as to what claims to assert is to be treated as would a dispute of this sort between an attorney and a client in an ordinary civil action.

In civil cases, the rule disposing of attorney-client disputes as to the conduct of the litigation is simple and clear. "In our legal system, an attorney is his client's agent and representative; the client retains ultimate authority

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2. At the time of the issuance of the Order at issue here, the Ninth Circuit had already denied the Warden's mandamus petition in this same "consolidated" action. See App. P. This being true, the Order, which stated that briefs were not necessary to the decision of the Ninth Circuit, is susceptible to the interpretation that, in view of the mandamus briefing provided by the parties, which the Ninth Circuit already presumably had fully considered, further briefing was unnecessary to its decision. This would suggest the collateral order appeal was denied on its merits, and that the Ninth Circuit upheld the decision of the district court that a prisoner's consent to "some of" the claims in the petition was effective to authorize the petition as a whole. The Warden submits that this ruling must be reviewed by way of certiorari for the reasons set forth here.

over the conduct of litigation. See ABA Code of Professional Responsibility EC 7-7 ('In certain areas of legal representation not affecting the merits of the case or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.')." Prate v. Freedman, 583 F.2d 42, 48 (2nd Cir. 1978)

As such, in civil litigation, a client has total control over 1) whether to file, and 2) the selection of claims asserted in the litigation. The counsel is a mere voice through which the client speaks. Although the attorney may bind the client by his actions, it is clear that in a dispute between the two the client prevails. It is only by virtue of the client's inclination to pursue litigation that the attorney-client relationship exists at all. If she does not decide as a plaintiff to sue, there is no suit. Similarly, should she decide as a defendant not to defend, similarly, there is no defense.

However, with respect to criminal litigation, the attorney has considerably more "say" in the conduct of the litigation. Jones v. Barnes, 463 U.S. 745, 750-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The question is, therefore, whether the relationship between an indigent state prisoner pursuing federal habeas relief and his counsel who is appointed for him pursuant to 21 U.S.C. § 848(q)(4)(B) is more like that between civil attorney and client or criminal defendant and counsel.

The Warden submits that the ancient case of Ex Parte Tom Tong, 108 U.S. 556, 559-60, 2 S. Ct. 871, 27 L. Ed. 826 (1883), suggest the answer when this Court noted, in habeas corpus actions, as in civil actions, the client must commence the litigation in order for it to exist. Any

prisoner under restraint is perfectly entitled to serve his sentence, even after appeal, without resort to the writ. The State does not commence the process and nothing compels the prisoner to take advantage of the writ.

The fact that this is a death penalty habeas corpus action does not alter the result. Although 21 U.S.C. § 848(q)(4)(B) provides that an indigent state prisoner can have counsel appointed for him, nothing compels the state prisoner to request counsel. He could easily file, and act as his own counsel in, a petition for writ of habeas corpus just as do thousands of state prisoners not under a sentence of death.

Nor does the existence of 21 U.S.C. § 848(q)(4)(B) lead to the conclusion that indigent habeas petitioners who have counsel appointed under such circumstances wield less power than do habeas petitioners who litigate their own cases. 21 U.S.C. § 848(q)(4)(B) simply provides:

> In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

It is clear that the statute merely provides counsel for those who wish to take advantage of it and imposes no restrictions or obligations on those who avail themselves of the services offered. Of course, prisoners are entitled to rely entirely on their counsel's judgment for

the conduct of the litigation if they so choose. However, it does not logically follow that if a habeas petitioner takes advantage of a benefit offered to him by the government, he is somehow less in control of the litigation or that the nature of the entire proceedings is changed from civil to criminal. Unless this Court rules otherwise at this point in time, the habeas prisoner is still in charge of as much of the litigation as he chooses to control. Particularly as in regards to the petition, which, like the civil complaint, is the pleading that commences and defines the contours of the litigation, he may insist that the most minute detail of the pleading satisfy his slightest whim.

In light of the foregoing, the district court clearly erred in holding that it could proceed in litigating the petition on the basis of the prisoner's prior approval of only some claims in the petition, when the state prisoner had subsequently disavowed the whole petition, and, at least, vehemently objected to the inclusion of certain claims contained in the petition. Likewise, the Ninth Circuit Court of Appeals clearly erred in summarily holding that the collateral order appeal should have been dismissed.

CONCLUSION

For the aforestated reasons, the Warden respectfully prays that the petition for certiorari be granted and, after a hearing or by a *per curiam* decision, the Court of Appeals for the Ninth Circuit be ordered to reinstate the collateral order appeal or, if this Court finds that the Ninth Circuit decision was on the merits, this Court grant a hearing to determine whether a petition can be "authorized" where an indigent state prisoner so objects to part of its contents that he disavows it.

Dated: June 3, 1998.

Respectfully submitted,

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Attorney General
GEORGE WILLIAMSON
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CAROL WENDELIN POLLACK
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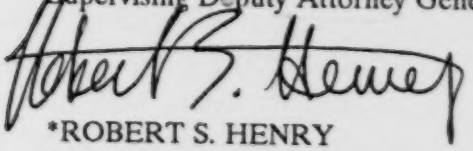

*ROBERT S. HENRY
Deputy Attorney General
*Counsel of Record

Counsel for PETITIONER

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No.

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner,*

v.

DOUGLAS DANIEL CLARK, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX
PETITION FOR WRIT OF CERTIORARI

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253 pp

APPENDIX

CONTENTS

A. Order of the United States Court of Appeals for the Ninth Circuit, filed March 6, 1998, amending a January 22, 1998 Order denying and dismissing petitioner's collateral order appeal.

B. The original Order of the United States Court of Appeals for the Ninth Circuit, filed January 22, 1998, denying and dismissing the appeal.

C. The Order of the United States District Court for the Central District of California, filed July 31, 1997, denying petitioner's motion to dismiss respondent's petition for writ of habeas corpus or, in the alternative, to compel full verification.

D. Petition for writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254 seeking to overturn his convictions and death sentences based on 27 different claims for relief.

E. Notice of Motion and Motion to Dismiss Petition as Unauthorized, or, in the Alternative to Compel Full Verification by [Clark].

F. Notice of [Clark's] Objection to Continued Representation by Appointed Counsel.

G. Actual Opposition to Fukioja's Perjurious Documents Filed 4-23-97 and 6-16-97.

TABLE OF CONTENTS, CONT'D

H. Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner.

I. Reply to Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner.

J. On July 7, 1997, Clark, *in propria persona*, filed a letter (see Appendix J) criticizing both his counsel and the Warden's reply.

K. Order Granting Request to Discharge Current Counsel and Appointing Manuel Araujo as Counsel for [Clark].

L. Respondent's Notice of Appeal.

M. Petition for writ of mandate and/or prohibition challenging the same order.

N. On October 1, 1997, the Warden filed a motion to consolidate the two cases.

O. On October 21, 1997, the Ninth Circuit issued an Order granting the consolidation of the two cases.

P. On November 12, 1997, the Ninth Circuit Court of Appeals issued an order of denying the petition for writ of mandate/prohibition.

Q. Petition for rehearing pursuant to FRAP 40.

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	No. 97-99022 D.C. No. CV-92-6567-RMT
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	No. 97-71020 D.C. No. CV-92-6567-RMT ORDER

FILED
MAR - 6 1998
CATHY A. CATTERSON
CLERK
U.S. COURT of APPEALS

Before: HUG, Chief Judge, SCHROEDER and REINHARDT, Circuit Judges.

This court's order, filed January 22, 1998, is amended by substituting the following:

The State's collateral order appeal is DISMISSED pursuant to Cohen v. Beneficial Loan Corp., 337 U.S.

541, 546-47 (1949). We hold that briefs are not necessary to our decision.

With this amendment made, the State's petition for rehearing is DENIED.

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	No. 97-99022 D.C. No. CV-92-6567-RMT
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	No. 97-71020 D.C. No. CV-92-6567-RMT ORDER

FILED
JAN 22 1998
CATHY A. CATTERSON
U.S. COURT OF APPEALS

Before: HUG, Chief Judge, SCHROEDER and REINHARDT, Circuit Judges.

The State's appeal based on the district court's collateral order is denied. The State submitted only a statement of issues and representation statement. This fails to comply with FRAP(28(a). We therefore dismiss

the appeal. N/S Corp. v. Liberty Mutual Insurance Co., 127 F. 3d 1145 (9th Cir. 1997).

APPENDIX C

DEATH PENALTY

ENTER

FILED
JULY 30, 1997
CLERK, DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JULY 31, 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	CV 92-6567-RMT
Petitioner,	ORDER DENYING MOTION TO DISMISS PETITION
vs.	AND ALTERNATIVE MOTION TO COMPEL FULL VERIFICATION
ARTHUR CALDERON, Warden of California Prison at San Quentin,	BY PETITIONER
Respondent.	THIS SUBSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

This matter having come before thecourt on the motion by respondent Arthur Calderon to dismiss petition as unauthorized or, in the alternative, to compel full verification by petitioner, and the court having considered the pleadings and other documents filed herein and determined that the petitioner's verification

of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler,

IT IS ORDERED that the motion by respondent Arthur Calderon to dismiss petition as unauthorized and his alternative motion to compel full verification by petitioner are respectfully denied.

Dated: 7/29/97

//o.s.
ROBERT M. TAKASUGI

APPENDIX D

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DOUGLAS DANIEL CLARK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	CV 92-6567-RMT
Petitioner,	DEATH PENALTY CASE
vs.	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
ARTHUR CALDERON, Warden of California Prison at San Quentin,	(28 U.S.C. § 2254)
Respondent.	

TO THE HONORABLE ROBERT M. TAKASUGI, UNITED STATES DISTRICT COURT JUDGE, CENTRAL DISTRICT OF CALIFORNIA:

Petitioner, DOUGLAS DANIEL CLARK, through his counsel, hereby files this Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, et seq. Petitioner sets forth the following facts and claims in support of the issuance of the requested writ and associated stay.

I.

GENERAL ALLEGATIONS

1. Petitioner DOUGLAS DANIEL CLARK is currently illegally confined and unlawfully held in custody by the California Department of Corrections at San Quentin State Prison, Tamal, California, by Arthur Calderon, Warden, in violation of the laws of the State of California, and the California and United States Constitutions. Petitioner has been assigned number C63000 by the California Department of Corrections.

2. Venue is proper in that Petitioner was convicted within the Central District of California.

3. Petitioner has not previously sought relief arising out of the claims set forth in this Petition from this Court or other federal court.

4. No execution date is pending.

5. (a) Petitioner was charged with violations of California Penal Code §§ 187, 190.2(a)(3), 12022(b), 12022.5,12022.7, 664 and 203 and California Health & Safety Code § 7052;

(b) Petitioner was charged by Information with six counts of first degree murder with special circumstances (multiple murders) and enhancements (use of a firearm); one count of mutilation of human remains; one count of attempted murder with enhancements (intentional infliction of great bodily harm, use of weapon); and, one count of mayhem with enhancements (use of weapon). Petitioner pled not guilty to all counts;

(c) Petitioner was found guilty of all of the above counts after a jury trial conducted in Superior Court for the State of California, County of Los Angeles, Los Angeles,California, in Case Nos. A361671 and A377385; and

(d) On March 16, 1983, Petitioner was sentenced to death.

6. (a) The State Public Defender filed a direct appeal from Petitioner's conviction with the Supreme Court of the State of California (Criminal No. 23109) in 1988. Petitioner's direct appeal was decided on July 30, 1992. The California Supreme Court upheld Petitioner's conviction on six counts of first degree murder with the special circumstance of multiple murders affirmed. The conviction for mutilation of human remains was affirmed. The conviction for attempted murder and mayhem was reversed. (See 3 Cal.4th 41, 10 Cal.Rptr.2d 640, 833 P.2d 561(1992));

(b) On August 14, 1992, Petitioner filed a Petition for Rehearing. That Petition was denied;

(c) After his conviction and during Petitioner's approximate 9 year wait for the filing and resolution of his direct appeal, Petitioner sent to the California Supreme Court various requests and petitions. Said requests and petitions were deemed by the California Supreme Court as constituting writs of state habeas corpus (Writ No. S004494). On March 2, 1989, the California Supreme Court denied sua sponte all of Petitioner's requests and petitions; and

(d) Each and all of claims raised herein were raised on direct appeal, or were encompassed within Petitioner's post-conviction requests and petitions to the California Supreme Court. To the extent any claim herein is somehow deemed to have not been raised by Petitioner's direct appeal or encompassed within Petitioner's post-conviction requests and petitions, the State expressly and impliedly excused, waived or abandoned any requirement that Petitioner exhaust his state remedies as to said claim. The State is barred from requiring Petitioner to do so as a result of its own improper and inequitable conduct, and undue delay.

II.
FIRST CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL)

7. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-6, supra.

8. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by reason of appellate counsel's ineffective assistance.

9. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Petitioner was represented by the California State Public Defender on direct appeal to the California Supreme Court;

(b) Petitioner's opening brief on appeal was not filed until 1988, five years after Petitioner's conviction;

(c) Petitioner's appeal was not decided by the California Supreme Court until July 1992;

(d) Throughout this nine year period, Petitioner repeatedly asserted his right to a timely and expeditious appeal and resolution thereof;

(e) Subsequent to the California Supreme Court's 1992 ruling, the State Public Defender was charged with the filing of a writ of habeas corpus in the California Supreme Court;

(f) Subsequent to the California Supreme Court's 1992 appellate ruling, Petitioner repeatedly his

right to a timely filed state habeas corpus petition and resolution thereof;

(g) The State Public Defender never filed a writ of habeas corpus in the California Supreme Court; and

(h) The State failed to replace the State Public Defender, or otherwise provide Petitioner with effective appellate counsel who would have timely filed a state habeas corpus petition on Petitioner's behalf.

10. Appellate counsel's acts and omissions were not and could not have been the result of any sound or rational strategic or tactical decisions. No competent appellate counsel would have failed to timely file a state writ of habeas corpus, or failed to seek a timely and expeditious resolution of Petitioner's direct appeal or habeas corpus petition. Appellate counsel's failure to do so was irrational and arbitrary.

11. Appellate counsel's acts and omissions, and the State's failure to provide Petitioner with effective appellate counsel, were prejudicial to Petitioner, and had a substantial and injurious effect on Petitioner's [sic] to develop and present a state writ of habeas corpus petition.

12. Appellate counsel's acts and omissions, and the State's failure to provide Petitioner with effective appellate counsel, were further prejudicial to Petitioner to the extent that they compromised Petitioner's right to timely and properly file the instant federal petition for a writ of habeas corpus.

13. In the absence of appellate counsel's ineffectiveness and the State's failure to provide Petitioner with effective appellate counsel,, Petitioner would have filed a timely and valid state writ for habeas relief which would have proven successful or would otherwise have preserved Petitioner's right to bring the instant federal petition for a writ of habeas corpus. The ineffectiveness of appellate counsel constituted a

violation of Petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments and, at a minimum, excuses any failure by Petitioner to file a formal state writ for habeas corpus.

III.

SECOND CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON VIOLATIONS OF PETITIONER'S RIGHT TO IMPARTIAL, TRIAL, AND APPELLATE JUDICIARY, AND REPRESENTATION)

14. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-13, supra.

15. Petitioner is being held in custody unlawfully. Said confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

16. Petitioner's due process rights were violated by the State because Petitioner was forced to develop and try his case before biased and arbitrary judges of the Superior Court, all of whom were ex-district attorneys and appointed by the Governor of State of California. An inherent bias against Petitioner and conflict of interest adverse to Petitioner existed by virtue of their appointment by the Governor and former employment by the District Attorney's Office,

17. In addition, Petitioner's due process rights were violated by virtue of the Trial Court's (Judge Torres) failure to recuse himself. The Trial Court improperly relied upon, and was influenced by, materials presented in a related but separate proceeding involving the murder of Mr. Jack Murray by Ms. Carol Bundy over which he presided. The Trial Court exhibited a clear bias against Petitioner throughout the

course of trial and, acting upon that bias, repeatedly interfered with Petitioner's defense, right to self-representation, right to representation, and right to due process.

18. Petitioner's due process rights were further violated by the State because Petitioner was forced to appeal his case to judges of the California Supreme Court which judges are appointed by the Governor. As such, the judges of the California Supreme Court possess an inherent bias against Petitioner and there exists an inherent conflict of interests; adverse to Petitioner.

19. Petitioner's due process rights were further violated by the State because Petitioner was forced to utilize the services of counsel employed or appointed by the State of California and, in particular, the State Public Defender. An inherent bias against Petitioner and conflict of interest adverse to Petitioner existed by virtue of their employment or appointment by the State.

20. Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments were violated. These violations require reversal of Petitioner's conviction and sentence of death.

IV.
THIRD CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENTS RIGHTS BASED ON DENIALS OF PETITIONER'S REQUESTS FOR SELF-REPRESENTATION MADE PRIOR TO COMMENCEMENT OF TRIAL)

21. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-20, supra.

22. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which improperly denied, or failed to grant, Petitioner's requests for self-representation made prior to the commencement of trial.

23. Prior to the commencement of trial proceedings on October 4, 1982, Petitioner made several timely and unequivocal requests for self-representation. Each of Petitioner's requests improperly denied by the trial court. These improper denials, considered individually or collectively, constituted a violation of Petitioner's constitutional rights.

24. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) On December 15, 1981, approximately 10 months prior to the commencement of trial, Petitioner appeared with counsel before the Trial Court. During the course of that appearance, Petitioner objected to the hearing of various motions brought by Mr. Keith. Petitioner objected to Mr. Keith's decision to proceed

with motions which Petitioner believed were not properly prepared and could not be effectively brought and resolved without further investigation. Petitioner then invoked his right to self-representation, stating that he no longer wanted to be represented by Mr. Keith and intended to represent himself pro per. The Trial Court (Judge Ringer) ignored this unequivocal assertion of Petitioner's Sixth Amendment right. The Trial Court chose to treat Petitioner's request as a Marsden request which it proceeded to summarily deny. (2 R.T. 454-68.);

(b) On July 26, 1982, approximately two and one-half months prior to the commencement of trial, Petitioner appeared with counsel before the Trial Court. At that appearance, Petitioner again invoked his right to self-representation, stating to the Trial Court that "[Mr. Keith] is dismissed. I'm thoroughly capable of handling this case." (5 R.T. 1327.) Petitioner indicated that in his pro per capacity, he would not consent to a waiver of time for trial and that he desired an immediate jury trial. The Trial Court (Judge Ringer) ignored this unequivocal assertion of Petitioner's Sixth Amendment right. The Trial Court chose to treat Petitioner's request as a Marsden request which it denied;

(c) On August 13, 1982, approximately two months prior to the commencement of trial, Petitioner appeared with counsel before the Trial Court. At that appearance, Petitioner again invoked his right to self-representation. Petitioner informed the Trial Court that a conflict of interest existed between him and counsel, that he wished to dismiss counsel, and that he wished to represent himself. Petitioner specifically stated that his request and related statements were to be construed and considered as a Faretta motion and a motion under California Penal Code § 987.9 for assistance of counsel. (6 R.T. 1411.)The Trial Court (Judge Ringer) refused to consider or rule upon Petitioner's motions. The Trial Court, instead,

instructed Petitioner to renew his motions when the case was transferred to the master calendar court;

(d) On August 19, 1982, still approximately two months prior to the commencement of trial, Petitioner appeared with counsel before the Trial Court. At that time, Petitioner renewed his previously submitted Faretta motion and motion under California Penal Code § 987.9. Petitioner further informed the Trial Court that he had provided written motion papers to counsel for filing. Counsel that Petitioner had provided him with these motions. (6 R.T. 1559.) The Trial Court (Judge Ringer) again refused to consider or resolve these motions. The Trial Court once again instructed Petitioner to renew his motions when the case was transferred to the master calendar court;

(e) On August 20, 1982, Petitioner's case was transferred to the master calendar court and Petitioner appeared with counsel. Petitioner informed the Trial Court that he had dismissed his counsel, that he was not represented by counsel, and that he had filed both a Faretta motion and a motion under California Penal Code § 987.9. The Trial Court (Judge Leetham) ignored Petitioner's pending motions, and refused to consider or resolve them. Instead, the Trial Court transferred the case "for all further proceedings" to Judge Torres. (6 R.T. 1560 A-2);

(f) On August 20, 1982, Petitioner appeared before the Trial Court with Judge Torres as the presiding judge. Petitioner informed the Trial Court of his pending Faretta motion and motion under California Penal Code § 987.9. Petitioner informed the Trial Court of the bases for his motions, including the existence of a conflict with counsel. Petitioner further informed the Trial Court that he wished to move promptly to trial, but that some modest delay would be necessary because he intended to file certain motions which counsel and failed to file.

The Trial Court admitted that it had only received the extensive case file that morning and had not had an opportunity to review it fully. (6 R.T. 1565.) Trial was not scheduled to start that day, and could not have started that day because, as the State recognized, "[we] [are] not in a posture of being ready to proceed to trial." (6 R.T. 1567)

The Trial Court did not inquire into the nature and extent of the conflict between Petitioner and counsel which had caused Petitioner to invoke his Faretta right. The Trial Court did not meaningfully inquire into, or make any finding regarding, the reason or extent of any actual delay which would have resulted if Petitioner's Faretta motion was granted. The Trial Court did not address Petitioner's repeated prior attempts to invoke his Faretta right. (6 R.T. 1571) Instead, the Trial Court summarily denied Petitioner's Faretta motion on the grounds that the request was not timely because trial was scheduled to begin that day and the case was complicated. (6 R.T. 1571);

(g) After denying Petitioner's Faretta motion on August 20, 1982, the Trial Court continued the proceedings until August 25, 1982. The Trial Court stated that it would hear all pretrial motions on August 25, and that jury selection would commence thereafter. The Trial Court noted, however, that jury selection would, in no event, commence before September 7, 1982, and that the courtroom would be "dark" from August 30 through September 6, 1982. (6 R.T. 1583);

(h) On August 25, 1992, Petitioner renewed his Faretta motion with the Trial Court. Petitioner stated that no undue delay would result if his Faretta motion was granted. The Trial Court considered Petitioner's statements, but denied Petitioner's renewed Faretta motion. As before, the Trial Court did not meaningfully inquire into, or make any finding regarding, the reason

or extent of any actual delay which would have resulted if Petitioner's Faretta motion was granted;

(i) Jury selection commenced on September 7, 1982;

(j) On September 7, 1982, prior to the commencement of voir dire, Petitioner renewed his Faretta motion. Petitioner stated that he wished to dismiss counsel and proceed pro se. This motion was denied by the Trial Court which refused to make an inquiry into Petitioner's motion. (7 R.T. 1671-64; 8 CT 2293);

(k) As set forth at Paragraphs 61-63, infra, the State, on the eve of trial and over the objections of Petitioner, was permitted to dismiss its charges that Petitioner was an accessory to the Murray murder;

(l) On September 20, 1982, Petitioner renewed his Faretta motion. This motion was denied by the Trial Court;

(m) On October 4, 1982, prior to the formal impanelment [sic] of the jury, Petitioner renewed his Faretta motion and requested that he be permitted to proceed in pro per. Petitioner stated that no undue delay would result if his Faretta motion was granted. Petitioner stated that, at most, a two-week continuance to prepare for trial would be required because his prior requests for pro per had been denied. (18 R.T. 4383-84)

The Trial Court responded that "'Mr. Clark, if you are ready to proceed in pro per at this moment without any attorneys, I'll grant your Faretta motion. Otherwise, it is denied." (18 R.T. 4383.) Faced with this Hobson's choice, Petitioner re-stated that he needed a short continuance of approximately two weeks. The Trial Court then denied his Faretta motion;

(n) The jury was empaneled and sworn on October 4, 1982; and

(o) As set forth in Paragraph 29(b) and (c), infra, after the commencement of trial, and almost two

months after Judge Torres' denial of Petitioner's Faretta motion as untimely, Petitioner's motion for self representation was granted on October 13, 1982.

25. The Trial Court improperly denied the requests for self-representation made by Petitioner prior to the commencement of trial. Said denials were improper, arbitrary, unconstitutional, and per se prejudicial. Said denials constituted improper exercises of the Trial Court's discretion and had a substantial and injurious effect on Petitioner's defense and the jury's verdicts. Standing alone or together, these denials require reversal of Petitioner's conviction and sentence of death.

V.

FOURTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENTS RIGHTS BASED ON DENIALS OF PETITIONER'S RIGHT TO SELF-REPRESENTATION AFTER COMMENCEMENT OF TRIAL)

26. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-25, supra.

27. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which improperly denied and restricted Petitioner's right to self-representation after the commencement of trial.

28. As set forth in Paragraphs 23-24, supra, the Trial denied several requests for self-representation status made by Petitioner prior to the commencement of trial. On October 12, 1982, eight days after the commencement of trial, the Trial Court improperly

denied a request by Petitioner for self- representation. On October 13, 1982, the Trial Court changed its decision and granted Petitioner pro per status.

Later, on at least two other occasions, the Trial Court again changed its decision and revoked Petitioner's pro per status. The Trial Court then later restored Petitioner's pro per status subject to certain restrictions. Among other things, the Trial Court required that in order to exercise his right to self-representation, Petitioner had to waive (i) his chosen defense of standing mute, (ii) his right to a reasonable continuance, (iii) his right to the assistance of advisory counsel, and (iv) his right to criticize the Trial Court and preserve an issue for appeal. Ultimately, the Trial Court permanently deprived Petitioner of his pro per status.

The Trial Court's decisions and conduct in this regard, considered individually or collectively, constituted violations of Petitioner's constitutional rights.

29. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Petitioner timely and unequivocally invoked his right to self-representation on numerous occasions prior to the commencement of trial on October 4, 1982. These requests were improperly denied;

(b) After the commencement of trial, on October 12, 1982, Petitioner renewed his Faretta motion because, among reasons, he wished personally to cross-examine Mindy Cohen, a key State witness. Petitioner stated that he was "ready to proceed forthwith". Petitioner also concurrently moved for assistance of advisory counsel. The Trial Court responded "[Mr. Clark,] [i]f you want to go forward as your own attorney, you'll go forward with no other

attorneys. You'll be by yourself." As Petitioner was attempting to respond, the Trial Court summarily denied his request for pro per status. As a result, Ms. Cohen's testimony concluded without an opportunity for Petitioner personally to cross-examine her;

(c) On October 13, 1982, Petitioner renewed his motion for pro per status. The Trial Court indicated that it would grant Petitioner's motion to proceed pro per, if, and only if, Petitioner agreed to abandon his right to any continuance or to the assistance of advisory counsel. Petitioner had no choice except to agree to the conditions imposed by the Trial Court. After Petitioner made these forced concessions, the Trial Court granted his Faretta motion on the ground that if "[i]t's his desire to proceed in pro per, the court grants -- reluctantly grants the privilege because I have -- there is nothing I can do about it." (20 R.T. 5025);

(d) On November 1, 1982, as Petitioner was proceeding in pro per, Petitioner experienced several adverse evidentiary rulings by the Trial Court. The Trial Court's ruling effectively precluded Petitioner from meaningfully presenting his defense that the charged murders had been committed by various third-parties. As a result, Petitioner informed the Trial Court that "the defense stands mute throughout the rest of the trial". (28 R.T. 6595.) In so doing, Petitioner specifically noted that "I have not renounced my pro per . . . I have a right to stand mute." (Id.)

The Trial Court did not inquire into the reasons underlying Petitioner's adoption of a "stand mute" defense strategy, or whether such a defense would have been in Petitioner's best interests. The Trial Court summarily and wrongfully concluded that Petitioner was not entitled to stand mute and ruled that Petitioner's decision to adopt this strategy constituted a renouncement of his pro per status. (Id. at 6596.) On

that basis, the Trial Court revoked Petitioner's pro per status and instructed appointed counsel to represent Petitioner. The Trial Court's decision was fully supported by the State. (Id. at 6671.)

On November 2, 1982, in order to regain his pro per status, Petitioner agreed not to "stand mute" and to present an affirmative defense during trial. On that condition, the Trial Court restored Petitioner's pro per status. (Id. at 6671-6674.) From approximately November 2 through December 2, 1982, as required by the Trial Court, Petitioner cross-examined the State's witnesses and affirmatively conducted a defense to the State's case. The Trial Court later characterized Petitioner's defense as incompetent and stupid. The Trial Court furthered opined that Petitioner's defense was evidence of a "death wish" and that Petitioner had "dug [a] hole and buried [himself] in this hole." (35 R.T. 8223; 37 R.T. 9018, 9022);

(e) On December 6, 1982, outside the presence of the jury, Petitioner stated that he believed the Trial Court was biased against him and had been attempting to improperly restrict the presentation of his defense. Hearing this statement, the Trial Court revoked Petitioner's pro per status because "[t]he court feels he is abusing the court and I will not take it any more." (37 R.T. 9006.) No finding was made by the trial court that Petitioner, acting pro per, had willfully obstructed or disrupted the actual trial proceedings before the jury.

Later that same day, the Trial Court stated that it believed Petitioner's "real'" state of mind was that he wanted to have his pro per status revoked, but was incapable of directly asking the Trial Court. The Trial Court further stated that it believed this was the real reason why Petitioner had been "'misbehaving all morning." The Trial Court stated it would restore

Petitioner's pro per status if he apologized to the Trial Court and agreed not to misbehave. (Id. at 9010.)

Petitioner apologized to the Trial Court, but restated his belief that the Trial Court was biased and the grounds for his belief. (Id. at 9010-13.) The Trial Court again stated that Petitioner had to apologize for questioning the integrity of the Trial Court and that "[i]f you don't apologize for that, you are not getting your pro per privilege back." Petitioner explained that he would not do so because he believed that the Trial Court was, in fact, biased and because an "apology" might be misconstrued and weaken this issue on appeal. (Id. at 9025-27.)

In response, the Trial Court permanently revoked Petitioner's pro per status and all other privileges afforded to Petitioner in court or the county jail, other than Petitioner's special diet. (37 R.T. 9026-7; see also 9 C.T. 2568.) In revoking Petitioner's right to self-representation, no finding was made by the trial court that Petitioner, acting pro per, had willfully obstructed or disrupted the actual trial proceedings before the jury; and

(f) After the Trial Court's revocation of Petitioner's pro per status, Mr. Keith was reappointed to represent Petitioner as lead defense counsel. Mr. Keith was reappointed even though he had not been present in court during all of Petitioner's pro per defense (48 R.T. 11877), and over Petitioner's objection that Mr. Keith had repeatedly been drinking during the trial proceedings. (20 R.T. 5021, 51 RT 12730-31.) No inquiry was conducted by the Trial Court into Petitioner's objection.

30. The Trial Court's denial, revocation, and restriction of Petitioner's right to self-representation after the commencement of trial were improper, arbitrary, and per se prejudicial. The denial, revocation, and restriction of Petitioner's right to

self-representation after the commencement of trial constituted improper exercises of the Trial Court's discretion and had a substantial and injurious effect on Petitioner"s defense and the jury's verdicts. Standing alone or together, these denials, revocations and/or restrictions require reversal of Petitioner's conviction and sentence of death.

VI.
FIFTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER"S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON INTERFERENCE WITH PETITIONER'S DEFENSE)

31. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-30, supra.

32. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which wrongfully interfered with and obstructed Petitioner's defense.

33. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Petitioner intended to present a defense demonstrating that third-parties, specifically Ms. Carol Bundy and Mr. Jack Murray, committed the crimes with which he was charged;

(b) During the course of the proceedings, as set forth in Paragraphs 60-63, infra, Petitioner was wrongfully deprived of a meaningful opportunity to prepare or present his third-party defense;

(c) On November 1, 1.982, because of certain adverse rulings made by the Trial Court, Petitioner, in his pro per status, stated that his defense would be to "'stand mute." The Trial Court then improperly revoked Petitioner's pro per status. (28 R.T. 6595-96.) The State concurred with the Trial Court, noting that "I think the court made the right decision in appointing counsel when the defendant indicated he was going to stand mute because he would be on the horns of a dilemma on an appeal if he stood mute throughout the trial. (28 R.T. 6671.)

The Trial Court did not inquire into or examine the reasons underlying Petitioner's decision to adopt a strategy of standing mute and did not attempt to determine whether such a defense would have been in Petitioner's best interests. The Trial Court, without any legal analysis or support, wrongly concluded that Petitioner, in his pro per status, could not stand mute. (37 R.T. 8870);

(d) On November 2, 1982, the Trial Court restored Petitioner's pro per status on the condition that Petitioner abandon his "stand mute" strategy and present an affirmative defense. Again, the State concurred, noting that "'if [Petitioner] intends to behave himself properly and conduct his defense, it seems to me he has to be accorded that right." (28 R.T. 6671);

(e) Petitioner, pursuant to the Trial Court's requirement, did not stand mute and presented an affirmative defense. In light of the various errors and rulings made by the Trial Court, the defense presented harmed and prejudiced Petitioner. The Trial Court ultimately acknowledged that by presenting his defense Petitioner had "'dug this hole and buried yourself in this hole." (R.T. 9018, 9022.) The State similarly acknowledged that Petitioner's defense had aided its

case. Had Petitioner been permitted to "stand mute", the jury would not have returned the verdicts it did;

(f) After the Trial Court forced Petitioner to abandon his stand mute strategy in order to regain pro per status, the Trial Court permanently revoked Petitioner"s pro per status on December 6, 1982. Petitioner's appointed counsel, Mr. Keith, had done virtually no investigation into Petitioner's third-party defense and ultimately provided constitutionally ineffective representation as set forth in Paragraphs 48-51, infra; and

(g) Petitioner moved for dismissal of all counts on the ground that the Trial Court had impermissibly ruled that Petitioner had no right to stand mute in terms of his defense. That motion was denied.

34. The Trial Court's interference with Petitioner's defense was improper, arbitrary, and per se prejudicial. It constituted an unlawful and invalid exercise of the Trial Court's discretion and had a substantial and injurious effect on Petitioner's defense and the jury's verdicts. In the absence of the Trial Court's wrongful interference, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's wrongful interference requires reversal of Petitioner's conviction and sentence of death.

VII.
SIXTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER"S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON DENIALS OF PETITIONER'S RIGHT TO SELF-REPRESENTATION, RIGHT TO REPRESENTATION, AND RIGHT TO DUE PROCESS)

35. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-34, supra.

36. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which improperly denied, interfered with, and restricted Petitioner's right to self-representation, right to effective representation by counsel, and right to due process. The errors of the Trial Court, considered individually or collectively, constituted a violation of Petitioner's constitutional rights.

37. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) On November 13, 1980, during his arraignment, Petitioner requested that the Trial Court (Judge Keene) permit him to serve as assistant counsel or co-counsel. (1 R.T. 5.) Petitioner's request was improperly and arbitrarily denied by the Trial Court which failed to make any inquiry into the bases for Petitioner's request. The Trial Court denied Petitioner's request solely on the basis that "I do not grant co-counsel privileges, I do not grant: assistant

co-counsel privileges, and I do not grant privileges pro per for defendants in county jail." (Id. at 8.)

(b) On December 9, 1980, Petitioner renewed with the Trial Court (Judge Ringer) his request that he be permitted to serve as assistant counsel or co-counsel. Petitioner set forth the bases for his request, including, inter alia, that his appointed counsel had failed to devote sufficient time to the case. Petitioner's request was improperly and arbitrarily denied by the Trial Court which failed to make any inquiry into the bases for Petitioner's request. Had the Trial Court conducted an inquiry, it would have found that Mr. Geragos, Petitioner's counsel at the time, had failed to devote sufficient time to the case and that Petitioner's request should have been granted.

(c) As set forth in Paragraph 24(a), supra, on December 15, 1981, Petitioner appeared with counsel, Mr. Keith, before the Trial Court (Judge Ringer). During that appearance, Petitioner invoked his right to self-representation. The Trial Court, however, elected to treat Petitioner's request as a Marsden motion for new or substitute counsel. The Trial Court then failed to exercise its discretion in a lawful and valid manner and summarily denied that motion.

The Trial Court made no meaningful inquiry into the status of Petitioner's relationship with Mr. Keith or as to the existence of a potential or actual conflict between them. (2 R.T. 454-68.) Had the Trial Court done so, it would have discovered, among other things, that Mr. Keith had a serious alcohol problem, that he was under severe financial pressures, and that irreconcilable conflicts existed which made it impossible for Petitioner and him to meaningfully communicate or cooperate in the conduct of Petitioner's defense;

(d) As set forth in Paragraph 24(b), supra, on July 26, 1982, Petitioner appeared with counsel, Mr. Keith, before the Trial Court Judge Ringer). During

that appearance, Petitioner again invoked his right to self-representation. Petitioner specifically stated that he was dissatisfied with the performance and preparedness of Mr. Keith with whom he had a conflict of interest. The Trial Court erroneously construed Petitioner's request as a Marsden motion which it proceeded to deny;

In treating Petitioner's request as a Marsden motion, the Trial Court again failed to exercise its discretion in a lawful and valid manner. The Trial Court made no meaningful inquiry into Mr. Keith's activities or preparedness, the status of Petitioner's relationship with Mr. Keith, or the existence of a potential or actual conflict between them;

(e) Faced with Mr. Keith's continuing representation, on August 13, 19, 20 and 25, 1982, Petitioner again invoked his right to self-representation. As set forth in Paragraphs 24(c)- (h), supra the Trial Court (Judge Ringer, Judge Leetham, Judge Torres) improperly denied or ignored Petitioner's Faretta motions;

(f) As set forth in Paragraph 24(1), supra, on September 20, 1982, Petitioner invoked his right to self-representation. The Trial Court (Judge Torres) improperly denied Petitioner's request;

(g) Mr. Keith conducted a disjointed and ineffective voir dire of prospective jurors. Mr. Keith appeared completely confused at various times during the jury selection process. (e.o., RT 2771-2803, 3789). Mr. Keith appeared equally confused during his examination of witnesses in connection with a motion to suppress the in-court identification of Ms. Anderman. (RT 3568, et seq.);

(h) On September 20 and 27, 1982, in light of the Trial Court"s refusal to grant Petitioner pro per status, Petitioner renewed his Marsden request for new

counsel. Petitioner explained the bases for his requests which included, inter alia, the fact that counsel had damaged Petitioner's case during his inept questioning of prospective jurors and that counsel was unprepared for trial. The Trial Court refused Petitioner an opportunity to make an offer of proof regarding counsel's ineffectiveness and unpreparedness for trial. The Trial Court denied Petitioner's Marsden requests without making any inquiry into the performance of counsel, or into the nature and extent of the conflict between Petitioner and counsel; (i) As set forth in Paragraph 24(m), supra, on October 4, 1982, Petitioner again invoked his right to self- representation which the Trial Court (Judge Torres)" improperly denied;

(j) As set forth in Paragraph 29, supra, on October 13, 1982, after the commencement of trial and the State's case, Petitioner again invoked his right to self-representation. Petitioner's request was granted under certain impermissible conditions imposed by the Trial Court;

(k) While proceeding pro per, Petitioner requested that he be provided with a law clerk or other legal assistant for legal research and other purposes. The Trial Court improperly denied these requests on the ground that Petitioner was not a real lawyer and, therefore, not entitled to such assistance. The Trial Court made no meaningful inquiry into Petitioner's requests and failed to exercise its discretion in a lawful and valid manner;

(1) As set forth in Paragraph 29, supra, from October 13 through December 6, 1982, the Trial Court revoked, reinstated,
and limited Petitioner's right to self-representation;

(m) As set forth in Paragraph 29, supra, on December 6, 1982" Petitioner's pro per status was permanently revoked by the Trial Court; and

(n) On December 6, 1982, Mr. Keith was reappointed as lead defense counsel for the balance of the guilt and penalty proceedings. Mr. Keith was reappointed over Petitioner's objections that he and Mr. Keith could not meaningfully communicate or cooperate, that Mr. Keith had been repeatedly drinking during trial, and that Mr. Keith seemed distracted and unprepared.

38. Throughout the course of trial, the Trial Court was presented with evidence of the irreconcilable conflicts which existed between Petitioner and Mr. Keith including, but not limited to, the following:

(a) On August 20, 1982, Mr. Keith indicated that Petitioner "would no longer discuss anything with me." (6 R.T. 1566.) Petitioner indicated that, as to Mr. Keith, "[t]here is no rapport, communication or any legal way that we can do business." (Id.);

(b) On October 13, 1982, Petitioner indicated that "to proceed with Mr. Keith as my attorney in any way, shape or form is suicide." (20 R.T. 5021);

(c) Petitioner referred to Mr. Keith as, among other things, a "buffoon", and a "dump truck" and "look[ing] like he rolled out of the Main Street Mission with his hair sticking out everywhere." (12 RT 2966-67);

(d) Mr. Keith told Petitioner in one instance to "[k]eep [his] fucking mouth shut". (1 RT 233);

(e) Petitioner implied that he was so dissatisfied and angry with Mr. Keith's representation that Petitioner might assault Mr. Keith;

(f) Counsel advised Petitioner not to testify. (43 RT 10329.) When Petitioner elected to testify, counsel refused to let Petitioner review notes he had previously prepared. Counsel refused to meet with Petitioner to review his testimony. When informed of counsel's refusal to meet with Petitioner, the Trial Court did not replace counsel. Instead, the Trial Court

validated counsel's failure because of Petitioner's supposed "abusive personality". (46 R.T. 11152.) As a result of his refusal to communicate and consult with Petitioner, Petitioner's examination proved completely ineffectual so much so that Petitioner was forced to cut short his direct examination and, thereby, further cripple his defense;

(g) Petitioner expressly invoked his rights to bar the disclosure of privileged information and instructed counsel not to call two psychiatric experts (Dr. Keyes and Dr. Lunde) during the penalty phase. Counsel disregarded Petitioner's instructions. Both experts ultimately offered non-mitigating testimony extremely damaging and prejudicial to Petitioner;

(h) During his penalty phase argument, Mr. Keith acknowledged that Petitioner made him mad and that he hated Petitioner. (52 RT 12897, 12898, 12923, 12925); and

(i) At the end of the penalty phase Mr. Keith remarked to Petitioner: "You are dead, Mr. Clark." Petitioner responded: "thanks to you, you fool." (52 RT 13031.) (52 RT 13031.)

39. Throughout the course of trial, the Trial Court was presented with evidence of Mr. Keith's unwillingness, inability or unpreparedness to competently represent Petitioner including, but not limited to, the following:

(a) Mr. Keith conducted a disjointed and ineffective voir dire of prospective jurors, appearing completely confused at various times during the jury selection process;

(b) Mr. Keith appeared confused during his examination of witnesses in connection with a motion to suppress the in-court identification of Ms. Andermann;

(c) Mr. Keith failed to oppose the State's motion for leave to show photographs of the bodies of

the victims during its opening statement which the Court eventually had to exclude on its own motion;

d) Mr. Keith failed to have his expert present during a defense motion to suppress in-court voice identifications and, as a result, did not offer expert testimony;

(e) During his examination of Petitioner, Mr. Keith elicited highly prejudicial and inflammatory testimony concerning such matters as necrophilia and death fantasies, and at points in time began to taunt Petitioner. (See, e.g., 38 RT 9191, 42 RT 9999, 10095). Mr. Keith's questioning of Petitioner caused the Trial Court to comment out loud that it had no idea what Mr. Keith was doing or why he believed it was helpful to Petitioner's case. (43 RT 10576);

(f) Throughout the trial, Mr. Keith appeared confused and disoriented, and engaged in erratic behavior. (See e.g., 49 RT 9412; 50 RT 12428, 12491); and

(g) Throughout the guilt and penalty phases of the trial, Mr. Keith engaged in various acts and omissions which fell far short of constitutional requirements. See Paragraphs 49-51, infra.

40. Despite significant evidence that Petitioner and Mr. Keith had irreconcilable conflicts and that Mr. Keith was not willing, able, or adequately prepared to proceed with Petitioner's defense, the Trial Court never made any inquiry in connection with Petitioner's various Marsden motions or related objections.

41. Had a meaningful inquiry been conducted at any point by the Trial Court, Mr. Keith would have been removed or replaced as counsel in accordance with Petitioner's requests. The Trial Court would have found that irreconcilable conflicts existed which made it impossible for Petitioner to meaningfully communicate with counsel or assist in the conduct of his defense. The Trial Court would have further found that Mr. Keith

had a serious alcohol problem, was under severe financial pressures, and was not willing, able, or adequately prepared to proceed with Petitioner's defense.

42. The Trial Court's initial refusals to conduct a meaningful inquiry into Petitioner's Marsden requests erroneously permitted Mr. Keith to initially act as counsel for Petitioner. To address this error, Petitioner was forced to waive counsel and proceed in pro per.

43. The Trial Court's later refusals to conduct a meaningful inquiry into Petitioner's Marsden requests erroneously permitted Mr. Kelth to be reinstated as counsel after revocation of Petitioner's pro per status and resulted in the providing of representation which fell far short of constitutional requirements.

44. The Trial Court's refusal to conduct a meaningful inquiry into Petitioner's Marsden requests deprived Petitioner of appointed counsel with whom he could have communicated and cooperated, and one who would have avoided the highly prejudicial and ineffective defense provided by Mr. Keith.

45. The Trial Court improperly denied, restricted, and revoked Petitioner's right to self-representation. Contemporaneously therewith, the Trial Court appointed impaired counsel with whom Petitioner could not meaningfully communicate or cooperate. The Trial Court's refusals to hold any hearing into Petitioner's requests for new counsel, or to substitute new counsel, were improper, arbitrary, and ser se prejudiclal.

46. The Trlal Court's decisions and acts, at a minimum, constituted improper exercises of its discretion and had a substantial and injurious effect on Petitioner's defense and the jury's verdicts. Said decisions and acts, considered individually or collectively, constituted a violation of Petitioner's constitutional right of self-representation, right to

effective representation by counsel, and right to due process, and require reversal of Petitioner's conviction and sentence of death.

VIII.
SEVENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL)

47. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-46, supra.

48. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by reason of counsel's ineffective assistance at the guilt and penalty phases of the trial.

49. As set forth in Paragraphs 37-39, supra, Petitioner, on numerous occasions, sought pro per status and/or requested that new counsel be substituted for Mr. Keith. The Trial Court improperly denied Petitioner's requests and required that Petitioner accept Mr. Keith as counsel. Having been forced upon Petitioner, Mr. Keith provided representation which fell below an objective standard of reasonableness and which unduly and irreparably prejudiced Petitioner. The effect of counsel's unreasonable failures and omissions, particularly when considered collectively, rendered their assistance constitutionally defective.

50. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Mr. Keith failed to disclose to the Trial Court that during the time he was representing Petitioner, he had a serious alcohol problem which had caused him financial hardship. Mr. Keith failed to disclose this during the Trial Court's consideration of Petitioner's requests for new counsel and even when Petitioner indicated that Mr. Keith appeared to have been drinking during trial and seemed distracted and unprepared.

Had Mr. Keith disclosed his drinking problem, he would have been removed or replaced as counsel in accordance with Petitioner's request. Mr. Keith did not make this disclosure because he needed to remain on the case and generate revenue to ease the financial strain he was under. Mr. Keith's failure to disclose this fact to the Trial Court had the effect of denying Petitioner the right to an appointed counsel with whom he could have communicated and cooperated, and one who would have avoided the highly prejudicial and damaging mistakes made at trial by Mr. Keith;

(b) Mr. Keith and Petitioner distrusted and hated each other, and could not meaningfully communicate or cooperate with each other to any extent. There was a complete breakdown in Mr. Keith's relations with Petitioner. Mr. Keith should have moved to be replaced or dismissed as counsel in the best interests of his client. Mr. Keith did not. Nor did Mr. Keith support Petitioner's Marsden requests for substitute counsel even though it was in Petitioner's best interest;

Mr. Keith failed to act in Petitioner's best interest because he needed to remain on the case and generate revenue to ease financial pressures he was under. Had Mr. Keith acted in Petitioner's best interests, he would have been replaced as counsel. As a result of Mr. Keith's conduct, Petitioner was denied the right to an appointed counsel with whom he could have

communicated and cooperated, and who would have avoided the ineffective and highly damaging representation actually provided at trial;

(c) During voir dire, Mr. Keith conducted a disjointed and ineffective questioning of prospective jurors, appearing completely confused at various times during the jury selection process;

d) During a key hearing concerning the admissibility of voice identifications by the State's witnesses, counsel failed to offer expert testimony because he had mis-calendered the hearing date and did not have his expert available. As a result, the Trial Court permitted the State to introduce the otherwise inadmissible voice identifications;

(e) Counsel failed to oppose the State's motion for leave to show photographs of the bodies of the victims during its opening statement. The photographs were excluded on the Trial Court's own motion;

(f) Counsel called Ms. Carol Bundy as a defense witness. At the time, Ms. Bundy was awaiting trial on a related murder charge. She, therefore, could not be called as a witness by the State. Counsel called Ms. Bundy as a defense witness, knowing full well that she would offer damaging testimony against Petitioner and that the State had given her immunity in order to facilitate her testimony. (38 RT 9068.) Prior to examining Ms. Bundy, counsel had little or no knowledge as to the specifics of her testimony. Counsel admitted that he was unprepared to examine Ms. Bundy. (40 RT 9520.)

During direct examination, counsel repeatedly elicited damaging testimony from Ms. Bundy. Many of the questions posed by counsel to Ms. Bundy would have been legally objectionable had they been asked by the State. Counsel elicited testimony, for example, that Petitioner kept a severed human head in his refrigerator which he would use to engage in sex acts in his shower;

that Petitioner had told her that he had killed 47 people (38 RT 9259); and, that Petitioner was involved with bondage and domination 39 RT 9377-79).

Ms. Bundy ultimately proved to be the single most damaging witness to Petitioner's case. The Trial Court became so concerned with counsel's calling and questioning of Ms. Bundy that it commented "I don't know why you called her and I'm not even going to question you on why you called her -- why she was called on behalf of the defense. I don't even want to get into that." (40 RT 9520.);

(g) During his examination of Ms. Bundy, counsel introduced into evidence a taped interview which she had given to the police. The tape included statements by Ms. Bundy about unproven and uncharged events which fell outside the scope of the trial (such as statements about uncharged murders committed by Petitioner). These ordinarily inadmissible statements were highly prejudicial to Petitioner. The Trial Court recognized this and offered to exclude the most prejudicial parts of the tapes. (40 RT 9683-89.) Counsel, however, requested that the entire tape be introduced into evidence and played for the jury. (40 RT 9683-86.) The Trial Court expressed its lack of understanding as to why counsel wanted the entire tape played, noting that "[a]fter hearing the tape, my opinion is just reinforced, that in no way does this tape help the defense." (42 RT 10062.) The State also acknowledged that the playing of the entire tape was highly beneficial for its case. (47 R.T. 11655);

(h) Against counsel's advice, Petitioner elected to testify during the guilt phase. Counsel refused to prepare Petitioner for his direct examination and took steps to actively undermine Petitioner's ability to testify. As a result of counsel's actions, Petitioner was greatly handicapped and prejudiced in his direct testimony. Petitioner was unprepared for questions posed by his

own counsel to the extent that Petitioner was finally forced to cut short his own direct examination. (46 RT 11154.) During his examination of Petitioner, Mr. Keith also elicited highly prejudicial and inflammatory testimony concerning such matters as necrophilia and death fantasies, and at points in time taunted Petitioner. (See, e.g., 38 RT 9191; 42 RT 9999, 10095.) Mr. Keith's questioning of Petitioner caused the Trial Court to comment out loud that it had no idea what Mr. Keith was doing or why he believed it was helpful to Petitioner's case. (43 RT 10576);

(i) Counsel failed to adequately investigate and/or present a third-party defense at either the guilt or penalty phase. As set forth at Paragraphs 60-64, infra, substantial independent evidence linked Ms. Bundy and/or Jack Murray to the commission of the murders in question;

(j) Counsel failed to properly raise the issue of privilege in support of its initial motion to suppress, and for the return of, legal work-product seized from the Lamphier residence as set forth at Paragraphs 54-59, infra. Counsel failed to make an offer of proof as to, or demand a hearing on, the privileged and confidential nature of the materials seized. Counsel failed to seek a writ of mandamus, or other emergency appellate relief, on the trial court's denial of the motion to quash. The failure of counsel to do so permitted the State to continue to invade Petitioner's defense strategy;

(k) Counsel failed to bring a motion to suppress the materials and statements illegally obtained by the State as set forth in Paragraphs 77-82, infra;

(l) Counsel failed to move to disqualify or recuse the Trial Court (Judge Torres) despite the Trial Court's obvious bias and prejudice against Petitioner, and despite the fact that the trial court had been unduly and improperly tainted as a result of its involvement in the Bundy proceeding;

(m) At the close of the guilt phase, counsel was unprepared to give his closing argument. Counsel stated that he left his notes at home because he did not think he was going to proceed that day. Counsel proceeded to argue extemporaneously. (48 R.T. 11837);

(n) During the guilt phase, counsel agreed to a jury instruction permitting the jury to consider the possible fabrication of evidence by Petitioner, despite the absence of any admissible evidence that Petitioner had attempted to do so;

(o) As set forth in Paragraphs 83-86, infra, during the penalty phase, counsel called two psychiatric experts (Dr. Keyes and Dr. Lunde) over Petitioner's objections. On direct examination counsel elicited a number of extremely damaging statements from both Drs. Keyes and Lunde. On cross-examination, the State also elicited extremely damaging statements from the two experts.

Either counsel failed to adequately prepare and instruct Drs. Keyes and Lunde and failed to investigate what they would testify to, or Drs. Keyes and Lunde failed to properly diagnose and evaluate Petitioner's condition. In either event, counsel called two experts whose testimony was extremely harmful to the defense. Counsel further failed to call any other expert witnesses during the penalty phase who would have testified favorably for Petitioner, offered mitigatory testimony, or mitigated the testimony of Drs. Keyes and Lunde;

(p) During the guilt and penalty phases, counsel failed to locate or properly utilize expert witnesses to rebut or negate evidence offered by the State purporting to show Petitioner's guilt (such as blood evidence);

(q) At the penalty phase, counsel affirmatively requested the Trial Court to permit Petitioner to give a closing argument, and made no efforts to make an offer

of proof as to why Petitioner was not competent to do so. Counsel understood that Petitioner would make statements highly damaging to his case. The State joined in counsel's request commenting that "I'm happy to have the defendant argue, he's never done me any harm yet." (52 R.T. 12886.) The Trial Court responded "[w]e all know that. We all know that." (Id.) Ultimately, Petitioner proceeded to argue at length in favor of the death penalty. (Id. at 12888- 94);

(r) During the penalty phase, counsel made inadequate closing arguments which were not likely to prevent Petitioner from receiving the death penalty. For example, counsel, at one point, argued that Petitioner was possessed of a "mind that cannot help itself be other than hateful" and that he was "not entitled to [the jury's] sympathy except in the sense that he is a sick person". (52 R.T. 12925.) Counsel's argument ultimately reduced itself to the suggestion that Petitioner should not be executed because he could be studied and examined. (Id. at 12916-17, 12922-23, 12966, 12968-71);

(s) During the penalty phase, counsel presented virtually no mitigating circumstances on behalf of Petitioner;

(t) During the guilt and penalty phases, counsel failed to object or otherwise seek to exclude highly inflammatory, prejudicial, and inadmissible evidence including, but not limited to, evidence of uncharged crimes allegedly committed by Petitioner and evidence of Petitioner's sexual fantasies and activities as set forth in Paragraphs 73-76 and 111-117, infra; and

(u) During the guilt and penalty phases, although counsel initially moved for an evidentiary hearing on Petitioner's competency, as set forth in Paragraphs 90-98, infra, counsel failed to later pursue that motion during the course of trial or take other steps to secure a judicial determination of Petitioner's

competence to stand trial or waive counsel including, but not limited to, an appellate writ. Reasonably competent counsel would have renewed on several occasions Petitioner's right to a judicial determination of his competence, and pursued that right through appellate review. Had counsel renewed and properly pursued his motion throughout the course of trial, the Trial Court would have been required to inquire into Petitioner's competency and ultimately have determined that Petitioner was not competent.

51. Each of the acts and omissions of counsel, including but not limited to the above, did not result from any sound or rational strategic or tactical decision, nor could it have. No reasonably competent trial counsel would have made these kinds of decisions (or non-decisions) which were irrational and arbitrary.

52. Counsel's acts and omissions, whether considered individually or collectively, were prejudicial to Petitioner. These acts and omissions, whether considered individually or collectively, had a substantial and injurious effect and influence in determining the jury's verdict to both the guilt and penalty phases.

53. In the absence of these instances of ineffectiveness by counsel, Petitioner would not have been convicted and.would no; have been sentenced to death. Counsel's failure to provide effective representation to Petitioner constituted a violation of Petitioner's rights under the Fifth, Sixth and rourteenth Amendments and requires reversal of Petitioner's conviction and sentence of death.

IX.
EIGHTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON ILLEGAL SEIZURE AND USE OF PRIVILEGED MATERIALS)

54. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-53, supra.

55. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

56. The Trial Court improperly permitted the State to improperly seize, use and admit into evidence privileged legal communications and work product prepared by Petitioner in connection with his defense.

57. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) On September 2, 1982, the State seized various materials from the residence of Ms. Bretta Jo ("Joey") Lamphier.

(b) The State seized these materials under a search warrant. The search warrant, however, was defective in that it was issued on the basis of hearsay statements and other proof which did not establish probable cause for the State's search.

(c) Numerous materials were seized from the Lamphier residence. Among other things, the State seize various legal and investigatory memoranda and work-product prepared by Petitioner. Such materials included case notes, factual and legal research conducted by Petitioner, notes and communications

from Petitioner to his counsel and potential witnesses, and the mental impressions and strategy of Petitioner regarding his defense.

(d) The materials had been prepared by Petitioner in anticipation of, and for use in, his pro per defense case. Petitioner had entrusted these materials to Ms. Lamphier in her capacity as a legal runner and messenger for Petitioner.

(e) The materials seized by the State permitted the State to ascertain Petitioner's defense strategy and, in particular, Petitioner's intent to demonstrate that Ms. Bundy and Mr. Murray committed the murders in question.

(f) Based on information seized from the Lamphier residence, the State altered its case strategy in order to undermine Petitioner's third-party defense. On September 7, 1982, the State moved to drop its charge that Petitioner was an accessory to the murder of Mr. Murray in order to limit Petitioner's ability to introduce evidence concerning, among other things, the striking similarity between the Murray murder and at least one of murders with which he was charged.

(g) On September 22, 1982, Petitioner moved to quash the warrant and for return of the materials seized by the State. On October 5, 1982, the Trial Court denied the motion to quash.

(h) Throughout the trial, the State sought to use and introduce into evidence the materials seized from the Lamphier residence. Petitioner objected to, and moved to exclude, these materials on the ground that they were improperly seized, and also privileged as attorney-client communications or Petitioner's work-product. The Trial Court overruled Petitioner's objections.

(i) The Trial Court failed to make any factual inquiry into the issue of privilege at any time during the

course of trial and simply inferred that the documents were not privileged.

58. Petitioner was substantially prejudiced by the rulings and actions of the Trial Court. The Trial Court permitted the State to seize, without probable cause, legal and investigatory materials prepared by Petitioner in his pro per status. The Trial Court further permitted the State to invade and inspect the trial strategy and mental work-product of Petitioner, and to use against Petitioner privileged materials prepared by him in the course of his case preparation.

59. The Trial Court's actions and omissions precluded Petitioner from presenting a meaningful defense, and were improper, arbitrary, and se_ se prejudicial. The Trial Court's actions and omissions constituted improper exercises of-the Trial Court's discretion and had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights. In the absence of the Trial Court's actions and omissions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions and omissions require reversal of Petitioner's conviction and sentence of death.

X.
NINTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON IMPROPER INTERFERENCE WITH PETITIONER'S THIRD-PARTY DEFENSE)

60. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-59, supra.

61. Petitioner is being held in custody unlawfully. The confinement is unlawful in that

Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which denied Petitioner a meaningful opportunity to investigate, prepare and present a defense demonstrating that third-parties, specifically Ms. Bundy and/or Mr. Murray, committed the crimes with which he was charged.

62. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Significant evidence existed which linked Ms. Bundy and/or her lover (and subsequent victim), Mr. Murray, to the commission of the murders in question. The evidence included, but was not limited to, the following:

(1) The murders were committed in Ms. Bundy's cars. (25 RT 6022; 26 RT 6113, 6175; 28 RT 6827);

(2) The weapons used in the murders, i.e., the Raven pistols, were purchased by Ms. Bundy and registered to her. (31 RT 7455; 32 RT 7782; 34 RT 8131);

(3) Clothing and jewelry belonging to various victims was surrendered to the police by Ms. Bundy. (39 RT 9430-34);

(4) Ms. Bundy knew details of the crimes that only the killer would know. (2 RT 366-75);

(5) A blood-stained painting was found hanging in an apartment rented and occupied by Ms. Bundy. (18 RT 4431; 28 RT 6737-38);

(6) A bullet matching those involved in the murders was surrendeLed to the police by Ms. Bundy. (39 RT 9432-33);

(7) The box in which the head of one victim was found was purchased by Ms. Bundy. (38 RT 9138);

(8) The murders in question closely resembled and were patterned after the murders committed by Ms. Bundy's namesake -- Ted Bundy; and

(9) Ms. Bundy was charged with the killing and decapitation of Mr. Murray, the details of which parallel the murder of one of the victims in Petitioner's case.

(b) In July 1981, the Trial Court (Judge Ringer) acknowledged the viability of Petitioner's third-party defense, stating that "I can see a theory which is that Mrs. Bundy is responsible for at least the homicide counts. On that theory it sounds discoverable." (1 R.T. 69.)

(c) The involvement of Ms. Bundy in the commission of the murders in question was implicitly recognized by the State which originally charged Petitioner as an accessory after the fact to Ms. Bundy's murder and decapitation of Mr. Murray. (1 R.T. 216; 4 CT 1096.)

(d) As set forth at Paragraphs 54-58, supra, after the illegal seizure of privileged materials from Petitioner, during voir dire on September 7, 1982, the State moved to drop its charge that Petitioner was an accessory to the Murray murder. The State's purported reason for this eleventh hour change in strategy was that the charge ttis not really connected in its commission with the other two crimes that are charged, and "doesn't seem worthy of being tried with the other counts." 17 R.T. 1734.)

(e) Petitioner objected to the State's motion on the ground that it was a transparent attempt to keep out evidence concerning the Murray murder and limit Petitioner's ability to show that Ms. Bundy and/or Mr.

Murray had committed the murders in question. The Trial Court recognized the potential prejudice to Petitioner, but nonetheless granted the State's motion. The Trial Court found that the State "is doing this in good faith" and that even if "the court dismisses it, that doesn't cause [Petitioner] prejudice. [Petitioner] can bring all this evidence [about the Murray murder] by way of defense evidence." (7 R.T. 1735; 8 CT 2293.)

(f) During the course of trial, the Trial Court denied Petitioner's efforts to obtain evidence concerning the Murray murder or which tended to show that Ms. Bundy and/or Mr. Murray committed the murders in question. In each instance, Petitioner made an offer of proof as to the relevance of the information sought and how the evidence was calculated to link Ms. Bundy and/or Mr. Murray to the murders in question. The Trial Court denied Petitioner access to this information and his requests for a meaningful opportunity to develop this defense. The Trial Court held that Petitioner was no longer charged with the Murray murder and, therefore, evidence of Ms. Bundy's murder and decapitation of Murray was irrelevant to the issues in Petitionerts trial.

(g) During the course of trial, Petitioner attempted to introduce evidence in support of his third-party defense and to examine witnesses concerning that defense. The Trial Court improperly excluded evidence and restricted Petitioner's right to examination, including, but not limited, to the following:

(1) The Trial Court excluded the details of the Murray murder which paralleled the murder of victim Wilson. Both Murray and Wilson were shot in the head with .25 caliber pistols (29 RT 6919-20), purchased and owned by Ms. Bundy. Both Murray and Wilson were shot in a vehicle and then decapitated with a

knife. In both instances, the victimsw heads were transported away from their torsos;

(2) In support of its theory that Petitioner had killed victim Comer in Ms. Bundy's car, the State introduced evidence that Petitioner had access to the car and that a large amount of human blood had been found on the passenger seat. On cross-examination of the State's criminalist, however, the Trial Court precluded Petitioner from establishing that Ms. Bundy had transported Murray's head in the car and that the blood from the head matched the blood found in the car. (30 RT 7159). As a result, in closing argument, the State was able to argue that human blood had been found in the car proving that Petitioner had killed victim Comer there. (48 RT 11969);

(3) The State relied heavily on the fact that the murder weapon in the charged offenses was found hidden at Petitioner's work place. Petitioner sought to prove that the gun was planted by Ms. Bundy by, among other things, showing that a second gun, which had been used by Ms. Bundy to murder Murray, had also been found at his work place. The Trial Court excluded this evidence. (35 RT 8335);

(4) The Trial Court denied Petitioner's request for production of four bloodstained pillows found in Murray's van where hs had been killed by Ms. Bundy which Petitioner believed contained blood from one or more of the victims in his case. (37 RT 8919);

(5) The Trial Court denied Petitioner's request for production of hair and dry tissue found in Murray's van, which Petitioner

believed came from victim Comer. (37 RT 8919);

(6) The Trial Court denied Petitioner's request for production of blond hair found on the ceiling of Murray's van which Petitioner believed came from victim Comer. (RT 8919-20);

(7) The Trial Court denied Petitioner's request for production of blood samples taken from the window frame of Murray's van which Petitioner believed came from one or more of the victims in his case, and the results of any related testing. (37 RT 8920-21);

(8) The Trial Court denied Petitioner's request for production of a shell casing found in Murray's van which was linked ballistically to one of the murder weapons. (37 RT 8921-22);

(9) The Trial Court precluded Petitioner from examining Ms. Bundy about the Murray murder, or the relationship between Murray and the one or more of the alleged victims. (38 RT 9053-54, 9099-139); and

(10) The Trial Court precluded Petitioner from examining Ms. Bundy about her and Murrayts sexual activities, craits, and activities.

(h) The Trial Court, prior to its rulings against Petitioner, had presided over a separate proceeding involving the indictment against Ms. Bundy for the Murray murder. During the The Trial Court was presented with various course of that motion, materials in which Ms. Bundy falsely stated that Petitioner alone had committed the murders in question and in which she also accused him of numerous other unproven and uncharged crimes. In denying Petitioner access evidence and other information relevant

to his third-party defense, the Trial Court improperly relied upon the materials presented during the Bundy proceeding, and rendered biased and improper rulings on that basis.

63. The Trial Court effectively "conspired" with the State to limit Petitioner's ability to present his third-party defense. The Trial Court first permitted the State to drop the Murray charge against Petitioner on the eve of trial, and then precluded Petitioner from meaningfully developing and presenting that defense, ruling, in essence, that any evidence relating to the Murray murder was irrelevant because Petitioner was no longer charged with that crime.

64. The Trial Court's actions and omissions precluded Petitioner from presenting a meaningful third-party defense were improper and arbitrary. The Trial Court's actions and omissions constituted improper exercises of the Trial Court's discretion and had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights. In the absence of the Trial Court's actions and omissions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions and omissions require reversal of Petitioner's conviction and sentence of death.

XI.
TENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF ANDERMANN TESTIMONY)

65. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-64, supra.

66. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court-which erroneously admitted into evidence highly prejudicial testimony by Charlene Andermann.

67. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Charlene Andermann was the victim involved in the attempted murder and mayhem charges brought against Petitioner.

(b) Ms. Andermann was assaulted on April 27, 1980. On May 22, 1980, Ms. Andermann underwent a hypnosis session conducted by the police in which she was asked to focus on the assailant's appearance and identity. Prior to hypnosis, Ms. Andermann had virtually no recollection about assailant's appearance and identity. After hypnosis, Ms. Andermann still recalled little about the assailant's appearance, but did-state that she believed his name was "Don" or "Ron."

(c) On July 30 and August 30, 1980, Ms. Andermann was shown a photographic line-up and then

a live line-up. In both instances, Ms Andermann failed to select Petitioner as her assailant.

(d) Two years later, in April 1982, Ms. Andermann was shown another photographic line-up. She then identified Petitioner as her assailant.

(e) At trial, Ms. Andermann was permitted to offer testimony concerning the attempted murder charge and related mayhem charge against Petitioner. During trial, Ms. Andermann recalled little of the events in question, and was unable to identify Petitioner as her assailant. (19 RT 4489-4540.) However, over Petitioner's objection, Ms. Andermann's prior photographic and in-court identification of Petitioner as her assailant were admitted into evidence. (Id. at 4545.)

(f) Ms. Andermann's prior identification of Petitioner was the only eyewitness testimony which actually placed Petitioner at the scene of any of the charged offenses, and constituted the only direct identification of Petitioner at trial.

(g) The California Supreme Court reversed Petitioner' convictions for attempted murder and mayhem on the grounds that Ms. Andermannls post-hypnotic testimony was inadmissible and unreliable.

68. Petitioner was substantially prejudiced by the Trial Court's actions. The Trial Court's erroneous admission of Ms. Andermann's faulty and unreliable eyewitness identification of Petitioner as, among other things, a knife wielding slasher and sexual predator had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights. In the absence of the Trial Court's actions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions violated Petitioner's right to due process and require

reversal of Petitioner's conviction and sentence of death.

XII.
ELEVENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF VOICE IDENTIFICATION TESTIMONY)

69. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-68, supra.

70. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which erroneously admitted into evidence highly prejudicial voice identification testimony by Mindy Cohen and Laurie Briggs.

71. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Mindy Cohen and Laurie Briggs had received telephone calls in which the caller had alluded to the murders with which Petitioner was charged;

(b) The State sought to introduce the testimony of Ms. Cohen and Ms. Briggs to establish that the caller was Petitioner. Specifically, the State sought to have them testify that Petitioner's voice was the voice of the caller;

(c) Petitioner objected to Ms. Cohen's and Ms. Briggs testimony. Ms. Cohen's and Ms. Briggs' voice identifications were inadmissible, inflammatory and prejudicial. The methods used to adduce the

identifications were unduly suggestive and failed to meet the minimum constitutional safeguards for reliability;

(d) Over Petitioner's objections, Ms. Cohen and Ms. Briggs were permitted to testify that Petitioner's voice was the voice of the caller;

(e) In permitting Ms. Cohen's and Ms. Briggs' testimony, the Trial Court failed to apply the correct legal standard and denied Petitioner a full and fair hearing on the issue of admissibility; and

(f) Had the Trial Court provided Petitioner with a full and fair opportunity to be heard and applied the correct legal standard, it would have been required to exclude the subject testimony as inherently unreliable, inflammatory and prejudicial.

72. Petitioner was substantially prejudiced by the Trial Court's actions. The Trial Court's erroneous admission of Ms. Cohen's and Ms. Briggs' faulty and unreliable testimony allowed the State to present direct evidence that Petitioner had knowledge of the charged murders and directly implicated Petitioner as the perpetrator of the charged murders. As such, the testimony had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights. In the absence of the Trial Court's actions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions violated Petitioner's right to due process and require reversal of Petitioner's conviction and sentence of death.

XIII.
TWELFTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON TRIAL COURT'S ERRONEOUS ADMISSION OF IRRELEVANT, INFLAMMATORY AND/OR UNDULY PREJUDICIAL EVIDENCE)

73. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-72, supra.

74. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which improperly permitted the State to introduce and/or admit a substantial amount of unduly prejudicial, inflammatory, irrelevant evidence about Petitioner's sexual preferences, character traits, and the commission of approximately thirty uncharged and unproven felonies and misdemeanors by Petitioner.

75. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The Trial Court permitted the State to introduce inadmissible, irrelevant and unsubstantiated testimony that Petitioner and Ms. Bundy had shot and killed a prostitute during oral sex with Petitioner;

(b) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory evidence that Petitioner had told a stripper that he fantasized about cutting the throats of prostitutes while engaged in sex with them;

(c) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory

evidence that Petitioner implied to a girlfriend that he would kill her ex- boyfriend if he continued bothering her;

(d) The Trial Court permitted the State to introduce inadmissible, irrelevant and unsubstantiated testimony that Petitioner had killed various unnamed and unidentified persons;

(e) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory testimony that Petitioner had oral sex with a prostitute in the presence of a twelve year old girl;

(f) The Trial Court permitted the State to introduce inadmissible, irrelevant and unsubstantiated testimony that Petitioner hated Mexicans;

(g) The Trial Court permitted the State to introduce inadmissible, irrelevant and unsubstantiated testimony regarding Petitioner's sexual traits, including that Petitioner was interested in necrophilia, sado-masochism and cannibalism, combined with equally inadmissible, irrelevant and inflammatory evidence that Petitioner had owned handcuffs and various knives;

(h) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory testimony that Petitioner had masturbated on a woman's chest while viewing pornographic materials depicting children;

(i) The Trial Court permitted the State to introduce isolated, inflammatory, and misleading pages from books and magazines found at Petitioner's residence which depicted sexual mutilation;

(j) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory evidence that Petitioner enjoyed kinky sex;

(k) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory evidence that Petitioner had used prostitutes and advertised for sexual partners;

(l) The Trial Court permitted the State to introduce inadmissible, irrelevant and inflammatory evidence that Petitioner enjoyed having sex with multiple female partners; and

(m) The Trial Court permitted the State to introduce inadmissible, irrelevant and unsubstantiated testimony that Petitioner had sold illegal drugs and engaged in fraud.

76. Petitioner was substantially prejudiced by the Trial Court's actions. The Trial Court's erroneous admission of unduly prejudicial, inflammatory, irrelevant evidence concerning Petitioner's sexual preferences, character traits, and the commission of various uncharged and unproven felonies and misdemeanors had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights. In the absence of the Trial Court's actions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions violated Petitioner's right to due process and require reversal of Petitioner's conviction and sentence of death.

XIV.
THIRTEENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON IMPERMISSIBLE INTERROGATION AND SEARCH)

77. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-76, supra.

78. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the

Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

79. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Upon being taken into custody, Petitioner was confined in a holding cell without food or bathroom facilities;

(b) Petitioner was not timely and properly informed that he had been arrested for the murders with which he was eventually charged;

(c) Prior to and during the course of the State's interrogation, Petitioner invoked his right to counsel approximately eight times. His requests were, in effect, disregarded by the State which proceeded to mislead Petitioner concerning the availability of counsel and thereby persuade him into speaking without counsel present;

(d) Several statements made by Petitioner during the course of the illegal interrogation were introduced by the State at trial including, but not limited to, that Petitioner had dated one of the victims, that Petitioner enjoyed kinky sex, and that Petitioner had, on occasion, looked for prostitutes;

(e) Contemporaneously with Petitioner being taken into custody and, as a direct result of the illegal interrogation, the State seized and then illegally searched Petitioner's wallet without a warrant. As a direct result of the illegal warrantless search, the State found and seized a telephone list allegedly written by Petitioner which identified telephone numbers for one of the victims and Ms. Cohen. The telephone list and related evidence were introduced by the State at trial;

(f) As a direct result of the illegal interrogation, Petitioner also consented to a search of his apartment. During the State's search of the

apartment, various items were found and seized, including a blood stained painting, a newspaper article concerning one of the victims, handcuffs, and adult books and magazines. These items were introduced by the State at trial; and

(g) As a result of the illegal interrogation and the illegal search of Petitioner's apartment, the State located and searched a garage rented by Petitioner. Upon searching the garage, the State found blood stains within the garage. The existence of these blood stains and related evidence were introduced by the State at trial.

80. Over Petitioner's objections, the Trial Court failed to suppress the introduction of the statements and materials obtained in violation of Petitioner's Fourth, Fifth and Fourteenth Amendment rights.

81. Petitioner was substantially prejudiced by the Trial Court's actions. The Trial Court's erroneous admission of this evidence had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights.

82. In the absence of the Trial Court's actions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions violated Petitioner's rights against unreasonable search and seizure and to due process and require reversal of Petitioner's conviction and sentence of death.

XV.
FOURTEENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON VIOLATION OF PETITIONER'S PATIENT-PSYCHIATRIST AND RELATED PRIVILEGES)

83. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-82, supra.

84. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

85. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) During the penalty phase, counsel attempted to call two psychiatric experts (Dr. Keyes and Dr. Lunde) on Petitioner's behalf. Petitioner instructed counsel not to call these experts. Petitioner further invoked his patient- psychotherapist privilege as well as any rights he possessed by virtue of an attorney-client privilege in an attempt to preclude the testimony of these experts;

(b) Counsel ignored the objections and instructions of Petitioner, and called these witnesses. (50 RT 12433-34, 12441- 42). Despite Petitioner's privilege objections, the Trial Court permitted counsel to call the two experts; and

(c) Once called, the two experts proceeded to offer testimony which was extremely damaging to Petitioner. For example, Dr. Keyes stated that Petitioner did not exhibit the sort of psychotic behavior

for which a person would be admitted to a hospital and treated. (50 RT 12513.) She further testified that there was no evidence that Petitioner was delusional in the sense that he suffered from hallucinations or heard voices, and that she would not designate Petitioner as a paranoid schizophrenic. (Id. at 12513-15.) Counsel further asked Dr. Keyes whether she found Petitioner to be manipulative, to which she responded affirmatively. (Id. at 12521.)

Dr. Keyes testified that Petitioner was sane, that he knew what he was doing at the time of the murders and that he knew it was wrong; that Petitioner was completely in touch with reality; and that his delusions did not affect his perception of reality. (Id. at 12553-54.) Dr. Keyes stated several times that Petitioner was not legally insane, and that he did not have any kind of disorder which would cause him not to understand what he was doing. (Id. at 12589-90, 12592.)

Similarly, Dr. Lunde compared Petitioner to ten notorious serial killers ~~he~~ had been studying. Dr. Lunde then suggested that Petitioner should be spared from the death penalty so that he could be studied and examined.

86. The Trial Court's failure to sustain the privilege objections of Petitioner and preclude the testimony of Drs. Keyes and Lunde substantially prejudiced Petitioner. The Trial Court's acts and omissions had a substantial and injurious effect on Petitioner's defense and the jury's verdicts, particularly in light of the Trial Court's other violations of Petitioner's due process rights. In the absence of the Trial Court's actions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions violated Petitioner's rights against unreasonable search

and seizure and to due process and require reversal of Petitioner's conviction and sentence of death.

XVI.
FIFTEENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON DENIAL OF PETITIONER'S DUE PROCESS RIGHTS)

87. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-86, supra.

88. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

89. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, those set forth in the First through Eleventh Claims for Relief. The Trial Court's errors and omissions, considered in whole, substantially prejudiced Petitioner. In the absence of those errors and omissions, Petitioner would not have been convicted of the murder counts and would not have been sentenced to death. The Trial Court's actions violated Petitioner's right to due process and require reversal of Petitioner's conviction and sentence of death.

XVII.
SIXTEENTH CLAIM FOR RELIEF
(VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BASED ON TRIAL COURT'S FAILURE TO INQUIRE INTO PETITIONER"S COMPETENCY)

90. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-89, supra.

91. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to hold an evidentiary hearing into Petitioner's competency.

92. As set forth in Paragraphs 1-46, supra, Petitioner properly and timely invoked his rights to self-representation and/or effective counsel on several occasions. Said rights were unlawfully and improperly violated by the Trial Court which attempted to rely on Petitioner"s behavior as a basis for it rulings. To the extent, however, that the Trial Court actually considered Petitioner's behavior in depriving Petitioner of his constitutional rights, that same behavior required the Trial Court to hold an evidentiary hearing into Petitioner's competency.

93. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) This matter was transferred to the Trial Court (Judge Torres) on August 20, 1982. The presiding judge had only recently received the case file and had little, if any, knowledge of prior proceedings

and was unaware that Petitioner had, for example, previously complained of secret informants in his cell. (RT 110.);

(b) On August 20, 1982, counsel informed the Trial Court that he wished to enter a plea of not guilty by reason of insanity for Petitioner. Petitioner would not consent to the entry of such a plea, stating that "[t]here is no rapport, communication or any legal way that [he and counsel] can do business";

(c) On October 13, 1982, during consideration of Petitioner's request to proceed pro per, counsel informed the Trial Court that Petitioner was "crazy, as crazy as anybody I've ever seen or ever will see." (A.R.T. 20) and, therefore, was not competent. Counsel twice requested that the Trial Court hold an evidentiary hearing or inquiry into the issue of competency, and stated that he was prepared to present testimony from psychiatric experts that Petitioner was not competent because of various mental and character disorders. (A.R.T. 19-23, R.T. 5024.) The Trial Court denied Mr. Keith's requests for an evidentiary inquiry into Petitioner's competency. The Trial Court then asked Petitioner a series of perfunctory questions regarding waiver of counsel and upon that basis, concluded that Petitioner had made a knowing and intelligent waiver of his right to counsel, but without any inquiry as to whether Petitioner was competent to stand trial;

(d) After considering the defense which Petitioner presented in his pro per status, the Trial Court stated that it believed Petitioner had a death wish and that Petitioner's defense was intended to achieve that wish;

(e) After considering Petitioner's conduct of his pro per defense, the Trial Court stated that it believed Petitioner's real state of mind was that he wanted to have his pro per status revoked and have

counsel appointed, but that Petitioner was incapable of expressly asking the Trial Court for this;

(f) Petitioner made constant references to the effect that Trial Court and the State were engaged in conspiracy to undermine his defense and convict him;

(g) Throughout the proceedings, Petitioner exhibited erratic and irrational behavior. At one point in time, the Trial Court ordered Petitioner to be bound and then removed from the courtroom, at which point Petitioner began to pound on the walls of the segregated holding area. (See, e.g., RT 1162B, 9523);

(h) During the penalty phase, Petitioner argued in favor of the death penalty;

(i) During the penalty phase, experts testified to a number of mental and character disorders suffered by Petitioner;

(j) During the guilt and penalty phase, substantial evidence existed that irreconcilable conflicts existed between Petitioner and counsel, and that it was impossible for Petitioner to meaningfully communicate with counsel or assist counsel in the conduct of his defense; and

(k) During the guilt phase, counsel objected to an instruction permitting the jury to presume that Petitioner was of sound mind on the ground that more than ample evidence existed that petitioner was incompetent.

94. Throughout the trial proceedings, the competency of Petitioner to stand trial was called into question by counsel, by the Trial Court's own comments, and Petitioner's conduct. The record before the Trial Court, particularly when viewed collectively, provided more than substantial evidence which, throughout the course of trial, called into question Petitioner's competency.

95. The Trial Court refused to conduct any inquiry whatsoever into the competency of Petitioner to

stand trial and the related issue of whether Petitioner was capable of assisting or cooperating with counsel in the conduct of his defense in a rational manner. To the contrary, the Trial Court, over the objection of counsel, instructed the jury that it could presume that Petitioner was of sound mind. (47 RT 11665.)

96. Had the Trial Court conducted such a hearing, evidence would have been presented that Petitioner was bi-polar manic; that he suffered from paranoia and various personality disorders (such as impulsivity, grandiosity and self-destructive behavior); that he was dysfunctional; and that his waiver of counsel was tantamount to an act of suicide caused by his self-destructive disorders.

97. Had the Trial Court conducted such a hearing, it would have been required to find that Petitioner was not competent to stand trial because, as a result of mental, emotional and character disorders and disabilities, he was unable to assist counsel in the conduct of his defense in a rational manner, did not have the capacity to cooperate with counsel without paranoid distrust, and could not advise, or accept the advice of, counsel.

98. The Trial Court's failure to conduct an evidentiary inquiry into Petitioner's competency violated his rights under the Fifth, Sixth and Fourteenth Amendments. These violations require reversal of Petitioner's conviction and sentence of death.

XVIII.
SEVENTEENTH CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF IMPERMISSIBLY VAGUE AND RESTRICTIVE INSTRUCTIONS REGARDING CONSIDERATION OF MITIGATING CIRCUMSTANCES)

99. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-98, supra.

100. Petitioner's sentence of death was obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to properly instruct, and limited, the jury's consideration of mitigating circumstances.

101. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The Trial Court instructed the jury that its role during the penalty phase was to weigh aggravating factors versus mitigating circumstances and that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death";

(b) This instruction unconstitutionally narrowed the discretion of the jury to exercise mercy, compassion or leniency in reaching its penalty decision. Specifically, a rational jury would have been confused and misled by this instruction into believing that its task was simply to mechanically measure in a numeric fashion aggravating factors against mitigating circumstances, and that the imposition of death was mandatory if the aggravating factors were simply more "weighty." The Trial Court's

instruction failed to inform the jury as to how the weighing process was to be performed, that it had the discretion to reject a death sentence even if the aggravating factors were more "weighty," or that mercy and sympathy were proper considerations;

(c) Petitioner specifically requested that the Trial Court instruct the jury that the jury was to assign the weight to be given to each mitigating or aggravating factor; that any mitigating factor standing alone was sufficient to justify a sentence of life without possibility of parole; that the combined number of factors was not determinative; and that the jury was not simply to count the factors on either side. The Trial Court refused to give these instructions;

(d) Using this erroneous instruction (and others as set forth in Paragraphs 105-123, infra), the State improperly argued to the jury that if it found the aggravating factors to be "weightier" than the mitigating circumstances, it had no choice or discretion except to find in favor of death; and

(e) This instruction, when viewed in light of the Trial Court's other errors regarding aggravating factors and mitigating circumstances (as set forth in Paragraphs 105-123, infra), predetermined and compelled the jury's death penalty verdict.

102. The failure of the Trial Court to give proper instructions regarding the consideration of mitigating evidence (and the State's improper argument) required the jury to deliberate without adequate guidance, limited its consideration of such evidence, and deprived Petitioner of the protection of procedures designed to ensure that all proper factors, including sympathy, are considered by the jurors.

103. Particularly in light of the Trial Court's other incorrect and misleading instructions discussed infra, the failure of the Trial Court to give proper instructions (and the State's improper argument)

regarding the consideration of mitigating circumstances had a substantial and injurious effect and influence in determining the jury's verdict in the penalty phase, and rendered the penalty phase of Petitioner's trial unfair and unreliable.

104. The failure of the Trial Court to give this instruction (and the State's improper argument) requires reversal of Petitioner's sentence of death.

XIX.
EIGHTEENTH CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF IMPERMISSIBLY VAGUE AND RESTRICTIVE INSTRUCTIONS REGARDING MITIGATING CIRCUMSTANCES)

105. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-104, supra.

106. Petitioner's sentence of death was obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to properly instruct, and limited, the jury's consideration of mitigating circumstances.

107. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The Trial Court instructed the jury that it could consider evidence only to the extent it "extenuates [sic] the gravity of the crime even though it is not a legal excuse for the crime." A rational jury would have been confused and misled by this instruction into believing that it could not consider any evidence unrelated to the "gravity of the crime" such as evidence

regarding Petitioner's family background. In this case, where counsel for Petitioner presented virtually no evidence in mitigation, delivery of this instruction improperly focused the jury on "the crime" (for which Petitioner was convicted by the same jury) and precluded the jury from considering any factors personal to Petitioner;

(b) The Trial Court instructed the jury that it could consider whether the offense was committed by Petitioner while "under the influence of extreme mental or emotional disturbance." A rational jury would have been confused and misled by this instruction into believing that it could not consider evidence of evidence of "non-extreme", albeit significant, mental or emotional disorders. Particularly where, as here, the Trial Court had instructed the jury that it could presume that Petitioner was of sound mind (47 RT 11665), and counsel presented flawed psychiatric testimony on behalf of Petitioner, delivery of this instruction would have precluded the jury from considering the various mental and emotional disorders suffered by Petitioner to the extent on the basis that they were not "extreme";

(c) During the guilt phase, the Trial Court instructed the jury, in part, that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." During the penalty phase, the Trial Court never instructed the jury to disregard all instructions given in the guilt phase of the trial, even though in the penalty phase, a jury is expressly permitted to consider sympathy or sentiment in reaching a penalty;

(d) During the penalty phase, the Trial Court similarly instructed the jury that it must "not be swayed by mere sentiment, conjecture, passions, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and

apply the law of the case and that you will reach a just verdict regardless of what the consequences of such verdict may be." The Trial Court then noted that " [i]n this part of the trial, the law does not forbid you from being influenced by pity for the defendant. However, the law does forbid you from being governed by mere conjecture, prejudice, passion or public opinion."

This inherently confusing and internally inconsistent instruction impliedly suggested that jurors were somehow limited in taking into account feelings of compassion or sympathy in reaching penalty verdict. The instruction suggested to a rational juror that pit was somehow different from mercy and compassion, and that these consequences to its decision were not to be considered; and

(e) Using the Trial Court's erroneous instructions as a foundation, the State improperly argued to the jury that its consideration of mitigating evidence were limited to the specific circumstances identified by the Trial Court, that it could consider mitigating evidence only to the extent that it extenuated the gravity of the crimes in question, that it could not permit mercy or sympathy to play a role in its deliberation.

108. The failure of the Trial Court to give proper instructions regarding the consideration of mitigating evidence (and the State's improper argument) required the jury to deliberate without adequate guidance, limited its consideration of such evidence, and deprived Petitioner of the protection of procedures designed to ensure that all proper factors, including sympathy, are considered by the jurors.

109. Particularly in light of the Trial Court's other incorrect and misleading instructions discussed infra, the failure of the Trial Court to give proper instructions (and the State's improper argument) regarding the consideration of mitigating circumstances

had a substantial and injurious effect and influence in determining the jury's verdict in the penalty phase, and rendered the penalty phase of Petitioner's trial unfair and unreliable.

110. The failure of the Trial Court to give this instruction (and the State's improper argument) requires reversal of Petitioner's sentence of death.

XX.
NINETEENTH CLAIM FOR RELIEF
(VIOLATIONS OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY VIRTUE OF FAILURE TO PROPERLY INSTRUCT ON, AND LIMIT, CONSIDERATION OF AGGRAVATING FACTORS)

111. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-110, supra.

112. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to properly instruct the jury as to its consideration and weighing of evidence regarding evidence offered in aggravation.

113. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) During the penalty phase, the Trial Court instructed the jury that in determining the penalty to be imposed, two of the factors it was to consider were the presence or absence of criminal activity by the Petitioner which involved the use or attempted use of force or violence or the express or implied threat to use

force or violence, and the presence or absence of any prior felony conviction. The Trial Court, however, failed to instruct the jury that these two factors were limited only to criminal activities or felony convictions other than those which Petitioner had been convicted of in the guilt phase. To the contrary, the Trial Court expressly permitted the jury to consider the underlying convictions as an aggravaty factor. (51 RT 12845.) The Trial Court's failure to give the proper limiting instruction permitted the jury to include the crimes for which Petitioner had been convicted of in the guilt phase in considering and weighing these two aggravating factors; and

(b) (1) During the penalty phase, the Trial Court improperly permitted the jury to consider and weigh as an aggravating factor evidence of approximately 30 instances of uncharged crimes and criminal activity allegedly committed by Petitioner. In considering that evidence, the jury was instructed that " [y]ou are not permitted to consider such evidence unless you find beyond a reasonable doubt that the defendant committed said crime or crimes or engaged in criminal activities which involved the use of force of violence or which involved the express or implied threat to use force or violence";

(2) The uncharged crimes and criminal activity which the jury was permitted to consider and weigh, included, but were not limited to:

Petitioner's purported admissions that he had killed a number of unidentified girls by slitting their throats during sexual acts and then engaged in oral sex with the dead bodies;

Petitioner's alleged statement to a girlfriend that he would kill her ex-boyfriend if he continued bothering her;

Sexual activities with a twelve year old girl;

Petitioner screaming at the Trial Court and telling the Trial Court that he (Judge Torres) was a Tijuana taxi driver and that Petitioner hated Mexicans;

Petitioner's alleged interest in and plans to engage in necrophilia, sado-masochism and cannibalism, and kinky sex.

Masturbating on a woman's chest while viewing pornographic materials depicting children;

The alleged sale of illegal drugs;

The alleged commission of insurance fraud;

The alleged commission of arson;

Petitioner's possession of pornographic materials;

Petitioner's alleged killing of or "hits" on various identified and unidentified victims;

Petitioner's alleged killing of Jane Doe 99;

Petitioner's alleged threat to kill an inmate;

Petitioner's alleged plans to kill various unidentified persons;

Petitioner's alleged physical abuse of a child;

Petitioner's alleged threat to kill co-workers;

Petitioner's possession of firearms and other weapons;

Petitioner's threatening of the prosecutor;

Petitioner's sticking of a knife through a car windshield;

Banging on his cell and screaming obscenities at the jail guards;

(3) The Trial Court should have, in the first instance, precluded the jury from considering this inflammatory and improperly prejudicial evidence because, as a matter of law, none of the conduct and evidence constituted a statutory aggravating factor which the jury could permissibly consider and weigh;

(4) The Trial Court should have, in the first instance, precluded the jury from considering this inflammatory and improperly prejudicial evidence

because the alleged instances of "crime or crimes" or "criminal activity' alluded to by the evidence could not, as a matter of law, have been proven beyond reasonable doubt or shown beyond a reasonable doubt to involve violence. For example, many of the alleged uncharged killings lacked a corpus delicti, and were supported by completely unreliable, speculative and inadmissible evidence. This was particularly true with respect to the alleged killing of Jane Does 28 and 99;

(5) The instructions given by the Trial Court regarding consideration of uncharged "crimes" or "criminal activity" were incorrect, incomplete, and improper because the Trial Court failed to identify the specific statutory "crime or crimes" or "criminal activity" which Petitioner was being accused of and give a limiting instruction precluding the jury from considering evidence unrelated and irrelevant to the specific "crime or crimes" or "criminal activity" which the State was attempting to attribute to Petitioner;

(6) The instructions given by the Trial Court regarding consideration of uncharged "crimes" or "criminal activity" were incorrect, incomplete, and improper because the Trial Court failed to instruct the jury as to the requisite elements (including the state(s) of mind) required for each specific crime being attributed to Petitioner;

(7) The instructions given by the Trial Court regarding consideration of uncharged "crimes" or "criminal activity" were incorrect, incomplete, and improper because the Trial Court failed to instruct the jury that, as to each specific crime being attributed to Petitioner, Petitioner was to be presumed innocent, the State carried the burden of proving each crime beyond a reasonable doubt, and the jury had to find unanimously and beyond a reasonable doubt, that Petitioner had committed the crime;

(8) The instructions given by the Trial Court regarding consideration of uncharged "crimes" or "criminal activity" were incorrect, incomplete, and improper because the Trial Court failed to instruct the jury that with regard to the specific "crime or crimes" or "criminal activity" which the State was attempting attribute to Petitioner, any alleged admission or adoptive admission by Petitioner was to be viewed with caution; and

(9) The instructions given by the Trial Court regarding consideration of uncharged "crimes" or "criminal activity" were incorrect, incomplete, and improper because the Trial Court's use of the phrase "that the defendant committed said crime or crimes or engaged in criminal activities which involved the use of force or violence . . ." (emphasis added), permitted the jury to consider any crime as an aggravating factor even if it did not involve the use of force or violence.

114. The Trial Court's failure to give the proper instructions regarding the jury's consideration and weighing of aggravating factors required the jury to deliberate without adequate guidance and permitted the jury to reach a verdict of death by weighing the impermissible cumulative effect resulting from consideration of the crimes for which Petitioner had been convicted in the underlying trial.

115. The Trial Court's failure to limit and/or give the proper instructions regarding the jury's consideration and weighing of aggravating factors also required the jury to deliberate without adequate guidance and deprived Petitioner of the protection of procedures designed to ensure that only statutory offenses proven beyond a reasonable doubt are considered by the jury as aggravating factors.

116. The Trial Court's failure to give this instruction had a substantial and injurious effect or influence in determining the jury's verdict and rendered

the penalty phase of Petitioner's trial unfair and the trial process unreliable, particularly when viewed in light of the Trial Court's other incorrect and misleading instructions regarding the jury's consideration of mitigating circumstances.

117. The failure of the Trial Court to give proper instructions requires reversal of Petitioner's sentence of death.

XXI.
TWENTIETH CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF FAILURE TO INSTRUCT ON NON-PERTINENT MITIGATING FACTORS)

118. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-117, supra.

119. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to properly instruct the jury regarding its consideration of non-pertinent mitigating factors.

120. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) During the penalty phase, the Trial Court instructed the jury that it could consider the existence or absence of any pertinent aggravating factor or mitigating circumstance;

(b) During the penalty phase, the Trial Court identified possible mitigating circumstances for the jury.

Certain of these mitigating circumstances were facially inapplicable to Petitioner's case. For example, the jury was told it could consider whether or not the victim was a participant in Petitioner's homicidal conduct or consented to the homicidal act, whether Petitioner was an accomplice to the offense, whether Petitioner's participation in the commission of the offense was relatively minor, whether Petitioner reasonably believed that the offenses were morally justified and whether Petitioner acted under "extreme" duress;

(c) During the penalty phase, despite a specific request by Petitioner that the Trial Court do so, the Trial Court refused to instruct the jury that the absence of evidence relating to an enumerated mitigating circumstance could not, as be considered or weighed as an aggravating factor; matter of law,

(d) In several instances the State improperly argued to the jury that the absence of evidence in support of any mitigating circumstance was, in and of itself, an aggravating factor which had to be considered and weighed by the jury. (e.g., RT 12876-880.) The Trial Court failed to give any curative instruction or admonition; and

(e) Because of the Trial Court's failures, the State improperly transformed the lack of evidence regarding certain enumerated mitigating circumstances into aggravating factors which were weighed and considered by the jury.

121. The Trial Court's failure to delete non-pertinent mitigating circumstances and subsequently give a limiting instruction permitted the jury to consider and weigh the absence of a mitigating circumstance as aggravating factor.

122. The Trial Court's failure to delete non-pertinent mitigating circumstances, its failure to instruct the jury that the absence of a statutory mitigatory factor did not constitute an aggravating

factor, combined with the State's improper argument, had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable, particularly when viewed in light of the Trial Court's other incorrect and misleading instructions regarding the jury's consideration of aggravating factors and mitigating circumstances.

123. The failure of the Trial Court to give this instruction (and the State's improper argument) requires reversal of Petitioner's sentence of death.

XXII.
TWENTY-FIRST CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF FAILURE INSTRUCT ON NON-ELIGIBILITY OF PAROLE AND LIMIT IMPROPER ARGUMENT BY STATE)

124. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-123, supra.

125. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court because it failed to instruct the jury that imposing the penalty of life without possibility of parole would result in Petitioner never being eligible for release from prison and limiting improper arguments by the State.

126. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Many of the jurors held the common belief that prisoners with life sentences are eventually released. As a result, they felt that imposition of the death sentence was the only way to ensure that Petitioner would not be released back into society; and

(b) The need for such an instruction was particularly strong in Petitioner's case because Petitioner had been convicted of a series of killings and because the State improperly argued that the death penalty was appropriate because Petitioner might kill while in jail or that he might escape.

127. Although the Trial Court gave a de minimis limiting instruction not to speculate as to what would happen if Petitioner were sentenced to life imprisonment, based on the State's argument and the lack of instruction regarding life sentences, a rational juror would have believed that the only means of ensuring that Petitioner would not be released on parole or escape or pose a future danger to society was to vote for the death penalty. Under these circumstances, the failure to instruct the jury regarding the finality of the sentence of life without possibility of parole was prejudicial and erroneous.

128. The Trial Court's failure to instruct (and the State's improper argument) had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable, particularly when viewed in light of the Trial Court's other incorrect and misleading instructions regarding the jury's consideration of aggravating factors and mitigating circumstances.

129. The failure of the Trial Court to properly instruct (and the State's improper argument) requires reversal of Petitioner's sentence of death.

XXIII.
TWENTY-SECOND CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF FAILURE TO INSTRUCT ON THE DEFINITIONS OF AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES)

130. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-129, supra.

131. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to properly instruct the jury as to the definitions of both an aggravating factor and a mitigating circumstance.

132. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The Trial Court failed to provide an instruction defining an aggravating factor as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself" and a mitigating circumstance as "any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."

133. The failure of the Trial Court to give this instruction required the jury to deliberate without adequate guidance, and deprived the Petitioner of the

protection of procedures designed to ensure that the jurors understood what factors are aggravating and what circumstances are mitigating. This failure permitted the jury to consider factors that were not aggravating and to disregard circumstances that were mitigating under the law.

134. The failure of the Trial Court to give this instruction had a substantial and injurious effect and influence in determining the jury"s verdict in both the guilt and penalty phases. This failure further rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable.

135. The failure of the Trial Court to give this instruction requires reversal of Petitioner's conviction and sentence of death.

XXIV.
TWENTY-THIRD CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF FAILURE TO INSTRUCT ON THE STANDARD OF PROOF GOVERNING WEIGHING OF AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES)

136. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-135, supra.

137. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court which failed to properly instruct the jury that it could impose death only if they were convinced beyond a reasonable doubt that aggravating factors outweighed mitigating factor and that death was the appropriate penalty.

138. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) Counsel requested an instruction to the jury that it could impose death only if they were convinced beyond a reasonable doubt that the aggravating factors outweighed any mitigating circumstances and that death was the appropriate penalty; and

(b) The Trial Court refused to give this instruction.

139. The failure of the Trial Court to give this instruction required the jury to deliberate without adequate guidance, and deprived the Petitioner of the

protection of procedures designed to ensure that the jurors understood what burden of proof it was to apply in considering aggravating factors and mitigating circumstances. This failure permitted the jury to impose death without finding beyond a reasonable doubt that existent aggravating factors outweighed the mitigating circumstances.

140. The failure of the Trial Court to give this instruction had a substantial and injurious effect and influence in determining the jury's verdict in both the guilt and penalty phases. This failure further rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable.

141. The failure of the Trial Court to give this instruction requires reversal of Petitioner's conviction and sentence of death.

XXV.
TWENTY-FOURTH CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF IMPERMISSIBLY VAGUE PENALTY PEASE INSTRUCTIONS)

142. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-141, supra.

143. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court because the penalty phase instructions were so vague that the jury was permitted to impose a sentence of death without sufficient guidance.

144. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The Trial Court delivered, inter alia, the following penalty phase instructions to the jury:

In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, (except as you may be hereafter instructed). You shall consider, take into account and be guided by the following factors, if applicable:

(1) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances) found to be true;

(2) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence;

(3) The presence or absence of any prior felony conviction;

(4) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(5) Whether or not the victim was a participant Ln the defendant's homicidal conduct or consented to the homicidal act;

(6) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

(7) Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(8) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication;

(9) The age of the defendant at the time of the crime;

(10) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor; and

(11) Any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

****

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant.
After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose

> a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.
>
> **********
>
> You shall now retire and select one of you number to act as foreperson who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

145. The Trial Court's instructions failed to give the jury sufficient guidance to permit it to return a constitutionally valid death penalty. The instructions did not provide the jury with specific and detailed guidance of rational, objective criteria, both as to the law and how to apply it. As result, these instructions did not provide constitutionally mandated legal constraints on the jury's sentencing discretion in determining whether aggravating factors outweighed mitigating factors.

146. The Trial Court's instruction had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable.

147. The Trial Court's vague instruction requires reversal of Petitioner's sentence of death.

XXVI.
TWENTY-FIFTH CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REASON OF IMPERMISSIBLY VAGUE PENALTY PHASE INSTRUCTIONS WHICH PERMITTED THE IMPOSITION OF A DEATH SENTENCE WITHOUT SUFFICIENT GUIDANCE TO THE JURY)

148. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-147, supra.

149. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court because the penalty phase instructions were so vague that the jury was permitted to impose a sentence of death without sufficient guidance.

150. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The factors enumerated by the Trial Court (i.e., factors (a) through (k)) do not inform the jury which of the enumerated acts are aggravating factors and which are mitigating, thereby failing to avoid the risks of ambiguity and uncertainly in their application. The discretion to be exercised by the jury could not, and was not, guided by a clear, objective and specific standard;

(b) The Trial Court's instruction did not require that the jury unanimously agree as to which statutory aggravating factor(s) were be used in making its sentencing decision. The failure to so instruct

permitted the jury to impose a sentence of death without being required or able to agree on which aggravating factors were proved;

(c) The jury was required to specify in writing the particular statutory aggravating factor or factors upon which it relied in reaching the decision to impose the death sentence. The failure to require such a record prevents meaningful post- trial appellate review; and

(d) The jury was not instructed that its determination that the aggravating factors outweigh the mitigating factors was required to be unanimous and beyond a reasonable doubt. The failure to so instruct permitted the jury to impose the death penalty in an arbitrary and random manner.

151. The Trial Court's instructions failed to give the jury sufficient guidance to permit it to return a constitutionally valid death penalty. The instructions did not provide the jury with specific and detailed guidance of rational, objective criteria, both as to the law and how to apply it. As result, these instructions did not provide Constitutionally mandated legal constraints on the jury's sentencing discretion in determining whether aggravating factors outweighed mitigating factors.

152. The Trial Court's failure to properly instruct had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable.

153. The Trial Court's failure to properly instruct requires reversal of Petitioner's sentence of death.

XXVII.
TWENTY-SIXTH CLAIM FOR RELIEF
(VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING GUILT AND PENALTY TO BE TRIED TO SAME JURY)

154. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-153, supra.

155. Petitioner is being held in custody unlawfully. The confinement is unlawful in that Petitioner's conviction and sentence of death were obtained in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These rights were violated by the Trial Court because the same jury was permitted to sit in both the guilt and penalty phases.

156. The facts which will be presented after a full investigation, discovery and evidentiary hearing in support of this claim include, but are not limited to, the following:

(a) The penalty phase trial implicitly required the jury to return a verdict of guilt or innocence with regard to the uncharged crimes aggravating factors presented and, specifically, and criminal activity relied upon by the State;

(b) The facts regarding the alleged aggravating crimes are presented to the same jurors who have already found the defendant guilty of first-degree murder and are therefore undeniably prejudice against the Petitioner; and

(c) it is improper for jurors who have previously evaluated the innocence or guilt of Petitioner to, in effect, serve on another trial involving charges against Petitioner.

157. Petitioner was prejudiced by this procedure at the penalty phase because had already

convicted him of multiple counts of murder. The guilt phase jury was so prejudiced against Petitioner as the result of its findings in the guilt/special circumstances phase of Petitioner's trial that it could not Impartially evaluate the evidence presented in aggravation during the penalty phase of Petitioner's trial.

158. A rational juror who had not been prejudiced against Petitioner by trying the guilt/special circumstance phase of Petitioner's trial would have entertained a reasonable doubt as to the truth of the aggravating circumstances presented during the penalty phase of Petitioner's trial. The failure under California law to require separate juries for the guilt and penalty phases of a capita' case was prejudicial and violated Petitioner's right to have his penalty determined by a fair, impartial and unbiased jury.

159. The failure to provide for separate juries had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable.

160. The failure to provide separate juries requires reversal of Petitioner's sentence of death.

XXVIII.
TWENTY-SEVENTH CLAIM FOR RELIEF
(IMPOSITION OF THE DEATH PENALTY IS UNCONSTITUTIONAL)

161. Petitioner incorporates by reference, as if fully set forth herein, Paragraphs 1-160, supra.

162. Petitioner is being held in custody unlawfully. The confinement is unlawful in that the sentence of death violates Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Certain grounds for this claim are supported or recognized by the existing law.

However, Petitioner raises these grounds because there exists a colorable and valid basis for seeking a change in the existing law.

163. The conviction and sentence of death were imposed in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because no procedural protection can adequately insulate the and imposition of the death penalty from Unconstitutionally arbitrary and pernicious factors. Although the United States Supreme Court has struggled over the past twenty years to define and enforce procedural safeguards that would allow the states to inflict capital punishment in an manner consistent with the Constitution, it is clear that a defendant's socio-economic background continues to play a significant and sometimes dispositive role in capital charging and sentencing decisions. Petitioner, an indigent defendant, was prejudiced by the inevitably inconsistent and (discriminatory use of the death penalty in violation of the fundamental principles of the Bill of Rights. The imposition of the death penalty on Petitioner violates his rights to be free from cruel and unusual punishment and to equal protection and due process.

164. The conviction and sentence of death were imposed in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because under the present legal standards, the death penalty is inherently unconstitutional. The mandates of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct., are irreconcilable. Under Furman, the sentencer's discretion must be limited by procedural rules and objective standards to avoid the arbitrary and capricious imposition of the death penalty. Under Lockett, the defendant must receive

individualized consideration and the sentencer must be free to considering any mitigating factor offered by the defendant. As Justice Blackmun has concluded, [T]he consistency promised in Furman and the fairness to the individual demanded in Lockett are not only inversely related, but irreconcilable in the context of capital punishment. Any statute or procedure that could effectively eliminate arbitrariness from the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "thro[w] open the back door to arbitrary and irrational sentencing.,, [citation omitted].

165. The conviction and sentence of death were imposed in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that, inter alia, Petitioner's sentence was imposed without intercase proportionality review. The United States Supreme Court has recognized that the Constitution requires that reviewing courts must ensure that the states administer the death penalty with an "even hand." Gardner v. Florida, 430 U.S. 346, 97 S.Ct. 1197 (1977). In the absence of intercase proportionality review, it is impossible to ensure that the death penalty is not administered in an arbitrary and capricious fashion. The necessity for intercase proportionality review is especially evident in California, where charging decisions are made by the District Attorneys of numerous different counties and sentences are determined by juries drawn from widely disparate communities. If intercase proportionality review had been conducted, the outcome of Petitioner's trial would have been

different. The failure to conduct intercase proportionality review had a substation and injurious effect of influence in determining the jury's verdict and rendered the guilt and penalty phases of Petitioner's trial unfair and the trial process unreliable.

166. For each of the foregoing reasons, Petitioner's sentence of death must be reversed.

PRAYER FOR RELIEF

For each and all of the foregoing reasons, Petitioner prays for the following relief:

1. That the Court issue a Writ of Habeas Corpus to have Petitioner brought before it in order that he may be discharged from his unconstitutional confinement and restraint.

2. That the Court issue a Writ of Habeas Corpus to have Petition before it in order that he may be relieved of his unconstitutional sentence.

3. That the Court order Respondent to produce the transcript of Petitioner's trial, the record on appeal, and the post-conviction record;

4. That the Court order and authorize discovery on behalf of Petitioner.

5. That the Court grant leave, if required, to file an Amended Petition for Writ of Habeas Corpus to incorporate any newly discovered claims for relief and/or factual allegations;

6. That the Court conduct a hearing at which evidence may be offered concerning any disputed factual allegations in the Petition;

7. That the Court stay Petitioner's execution pending final disposition of this Petition, pursuant to 28

U.S.C. §2251 and Rule 26.8.7(a) of the Local Rules for the Central District of California;

8. That the Court hold this Petition in abeyance in the event that the Court concludes that State remedies with regard to any claim in this petition have not been exhausted and that the exhaustion of claims has not otherwise been excused, waived or abandoned by the State; and

9. That the Court grant such other relief as may be appropriate and to dispose of the matter as law and justice requires.

DATED: April 22, 1997

GOMEZ, FUJIOKA & FURUKAWA
FRED J. FUJIOKA

WILLIAM C. HSU, of Counsel

By: /ss/_____
FRED J. FUJIOKA ESQ.
Attorneys for Petitioner
DOUGLAS DANIEL CLARK

9. That the Court grant such other relief as may be appropriate and to dispose of the matter as law and justice requires.

VERIFICATION OF FIRST THROUGH FIFTEENTH CLAIMS FOR RELIEF

I, DOUGLAS DANIEL CLARK, declare as follows:

I have read the foregoing Petition and am familiar with it s contents. The information in the Petition is true and correct to the best of my knowledge, information, belief and understanding.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23 day of APRIL, 1997 at MARIN COUNTY, California.

/os Douglas Daniel Clark

VERIFICATION

OF THE SIXTEENTH THROUGH TWENTY SEVENTH CLAIMS FOR RELIEF UNDER THE PETITION

I, FRED J. FUJIOKA, declare as follows:

1. I am an attorney licensed to practice in the State of California and am a member of the Bar of this Court. I am one of the court-appointed counsel for DOUGLAS DANIEL CLARK ("Petitioner") in this federal habeas corpus proceeding. I submit this verification in compliance with Local Rule of Court 26.2., with regard to the Sixteenth through Twenty Seventh Claims under the Petition for Writ of Habeas Corpus By A Person In State Custody ("Petition").

2. I have provided a copy of the Petition to the Petitioner and informed Petitioner of its contents and the claims brought therein. The First through Fifteenth Claims for Relief were personally verified by Petitioner on April 23, 1997. Said verification is attached to the Petition.

3. The Sixteenth through Twenty Seventh Claims for Relief are not being personally verified by Petitioner. I am informed and believe that Petitioner may be suffering from a mental disorder, condition or state which is presently preventing him from meaningfully assisting and communicating with counsel with regard to the Petition and, in particular, the Sixteenth through Twenty Seventh Claims for Relief. At this time, Petitioner is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief.

4. A possibility exists that the Petition must be

filed by April 23, 1997, in order to preserve all of Petitioner's substantive rights to challenge the constitutionality of his conviction and sentence under the United States Constitution. Therefore, on Petitioner's behalf, I am verifying the Sixteenth through Twenty Seventh Claims for Relief in order that they may be filed by April 23, 1997, and to preserve all of Petitioner's rights to seek federal relief.

5. The Sixteenth through Twenty Seventh Claims for Relief are based, in large part, on the record and facts contained in the underlying Reporter's and Clerk's Transcripts. In addition, some of the claims are based on information obtained by counsel during the course of the pre-petition investigation.

6. I have personally reviewed all of the materials upon which the facts alleged in the Petition are based. I have, for that reason, personal knowledge of the facts upon which the Petition's claims are based. Further, I believe that the claims raised in the Petition present non-frivolous federal constitutional issues.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of April, 1997 at Los Angeles, California.

//os
FRED J. FUJIOKA

APPENDIX E

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON,
Chief Assistant Attorney General
CAROL WENDELIN POLLACK,
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Attorneys for Respondent

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	NO. CV 92-6567 RMT
Petitioner	[DEATH PENALTY CASE]
v.	
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	NOTICE OF AND MOTION TO DISMISS PETITION AS UNAUTHORIZED, OR, IN THE ALTERNATIVE, TO COMPEL FULL VERIFICATION BY PETITIONER
Respondent.	Hrg: June 30, 1997 Time: 9:30 a.m. Courtroom: 22

Table of Contents

MEMORANDUM OF POINTS AND AUTHORITIES 3

INTRODUCTION 3

ARGUMENT 11

I THIS COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION UNLESS IT IS AUTHORIZED BY PETITIONER

II PETITIONER MUST VERIFY A WHOLE PEITION OR, IN THE ALTERNATIVE, THE ACTION MUST BE DISMISSED

III THE TIME LIMITS CONTAINED IN THE AEDPA WOULD NOT PREVENT THE FILING OF AN AMENDED PETITION UNDER CERTAIN CIRCUMSTANCES 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Pages
Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1994)	13
Lucky v. Calderon, 86 F.3d 923 (9th Cir. 1996)	11-13, 15, 18
Statutes	
28 U.S.C. § 2254	17, 20

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	NO. CV 92-6567 RMT
Petitioner	[DEATH PENALTY CASE]
v.	
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	NOTICE OF AND MOTION TO DISMISS PETITION AS UNAUTHORIZED, OR, IN THE ALTERNATIVE, TO COMPEL FULL VERIFICATION BY PETITIONER
Respondent.	Hrg: June 30, 1997 Time: 9:30 a.m. Courtroom: 22

Respondent hereby gives notice that on or about June 30, 1997, at 9:30 a.m., in Courtroom 22 of the above entitled court, respondent will, and does hereby, move this Honorable Court to dismiss the Petition for Writ of Habeas Corpus purportedly filed in the above entitled

action on behalf of petitioner on the ground that it is unauthorized, or, in the alternative, will move this Court to order that petitioner fully verify whatever amended petition that may be subsequently filed.

This motion is made on the ground that this Court lacks jurisdiction to adjudicate an unauthorized petition for writ of habeas corpus.

This motion is based on the pleadings, records and files in the above entitled action including, but not limited to, this notice and motion and the "Petition for Writ of Habeas Corpus" filed in this case on or about April 23, 1997, and such other documentary and oral evidence that may be introduced at any hearing on the matter or adduced therein.

Dated:

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General

ROBERT S. HENRY
Deputy Attorney General

Attorneys for Respondent

RSH:rm
LA95XW0006

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioner was convicted in California state court of six counts of first degree murder. Multiple murder special circumstances and enhancements for personal use of a firearm were found true as to each of the murder charges. The jury further found petitioner guilty of one count of mutilation of human remains, as to one of the murder victims, and of attempted murder and mayhem as to a different victim. The jury set the punishment at death. After an automatic appeal, the attempted murder and mayhem convictions were reversed and all but one of the multiple-murder special circumstance findings were set aside but in all other respects, the judgment and sentences were affirmed in People v. Clark, 3 Cal. 4th 41, 833 P.2d 561, 10 Cal.Rptr. 2d 554 (Cal. 1992).

Petitioner's petition for certiorari review was denied on March 22, 1993 in Clark v. California, 507 U.S. 993, 113 S. Ct. 1604, 123 L.Ed.2d 166 (1993). On April 24, 1996, President Clinton signed the Anti-terrorist and Effective Death Penalty Act (hereinafter referred to as "AEDPA") which, *inter alia*, provided that federal habeas corpus petitions challenging state court convictions must be filed within one year after finality of the conviction or denial of certiorari review, if sought, tolled by any period of time during which the petitioner is pursuing state collateral relief.

On April 23, 1997, petitioner timely filed this habeas corpus petition. The petition pleads that petitioner's state appellate counsel filed no state collateral relief actions on his behalf. Pet. at 5. The petition, however, alleges that only claims one through fifteen were verified by petitioner and that claims sixteen through twenty-seven were verified by federal habeas counsel by reason of counsel's belief that petitioner is "suffering from a mental disorder, condition or state which is presently

preventing him from meaningfully assisting and communicating with counsel with regard to the Petition and, in particular, the Sixteenth through Twenty Seventh Claims for Relief. At this time, Petitioner is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief." Pet. at 102. Respondent asserts, based thereupon, that petitioner has thereby effectively asserted that he is unwilling to verify the petition and, as such, as shown below, the petition must either be dismissed as unauthorized, or, in the alternative, petitioner must fully verify whatever form of the petition[1] upon which he will choose to rely.

FACTS RELATING TO AUTHORIZATION QUESTION

On or about May 1, 1997, respondent received a document purportedly written by petitioner *in propria persona* entitled "Motion to Correct Petition." In this document, which respondent hereby attachs and incorporates as exhibit A, petitioner attempts to effectuate changes to the petition for writ of habeas corpus.

As stated in the above footnote, however, it is unclear just how the verification process in this petition proceeded. Petitioner's purported personal verification is contained on page 100 of the petition. First, at the top of page 100 and seemingly carried over from page 99 is the following:

> 9. That the Court grant such other relief as may be appropriate and to dispose of the matter as law and justice requires. Pet. at 100.

---

1. As will be shown below, it is unclear which precise contents of the petition, or part of the petition, that petitioner personally verified.

However, page 99 itself contains the identical paragraph 9 but followed by the date and the masthead and signature of petitioner's counsel.

Moreover, on closer inspection it can be observed that on the personal verification of the petitioner, although the word "VERIFICATION" is seemingly centered with respect to the body of the type that comprises the declaration, the words "OF FIRST THROUGH FIFTEEN CLAIMS FOR RELIEF" appear to be off-center to the right of the word "verification," and indeed the word "CLAIMS," the first word on the second line of the caption, is not commenced under the word "VERIFICATION" but instead is commenced under the word "FIRST."

Additionally, in the body of the personal verification by petitioner himself, petitioner avers that the "The information in the Petition is true and correct to the best of my knowledge, information, belief and understanding." However, it is puzzling that if petitioner had knowledge that he was only verifying claims one through fifteen, why his counsel would not prepare, and the language of the verification would not state, that the information "in claims one through fifteen" is true and correct to the best of petitioner's knowledge.

Lastly, even greater mysteries present themselves when petitioner's personal "Motion to Correct Petition" is compared with the petition served upon respondent and therefore, presumably, filed with this Court. In this document, petitioner first pleads that, "Upon closer inspection, following a meeting with 'counsel' April 23, 1997, at San Quentin Prison, I discovered a few significant false or grossly incorrect statements in the brief. Counsel's typographical errors aside, these matters require instant correction."

Regardless of the merits of the document filed by petitioner *in propria persona*, by comparing petitioner's page references to the corrections he attempts to

effectuate with the petition served upon respondent, respondent is unable to make sense of the "Motion to Correct Petition" in that it does not appear to relate to the petition served upon respondent.

Specifically, although petitioner's corrections enumerated 1 through 2 on pages 1-2 of his "Motion to Correct Petition" (hereinafter referred to as "Motion") do appear to relate to the petition served upon respondent, the next correction in the "Motion," purportedly pertinent to page 5, line 17 of the petition, seemingly relates to an averment with respect to the appointment of counsel to represent petitioner whereas the petition, at this point, discusses how the state court failed to replace the counsel after counsel failed to file a petition for writ of habeas corpus. See Exh. A at 21-22.

As an example of a different type, petitioner's correction number 4 purports to change page 4, line 27 by substituting "Prior to" for "Subsequent to." Exh. A at 22. However, the petition served upon respondent contains no such language near that point of the pleading.

More precisely, however, in petitioner's correction enumerated 8, petitioner specifically refers to "Pg 8 Line 13 item 16." Exh. A at 22. By use of the word "item," petitioner, as he did with respect to his first correction on page 1 of the "Motion," means to refer to the paragraph numbers utilized by the petition. However, on the petition served upon respondent, page 8, line 13, is part of the caption explaining the contents of the third claim for relief, and, moreover, page 8 relates to paragraph numbers 19 through 23.

Further, petitioner's correction number 9 discusses California Supreme Court justices appointed by the governor but cites page 9, line 1 of the petition, which, if respondent was served with the same copy, instead discusses petitioner's attempts to gain self-representation. Exh. A at 22.

More oddly, petitioner's correction number 11 attempts to add the word, Farretta [sic], between the words "written" and "motion" on page 12, line 14 and petitioner's correction number 12 seeks to insert the word "told" between "Counsel" and "that" on page 12, line 15. See Exh. A at 23. Again, on respondent's service copy of the petition, those words are not present. However, on page 10, lines 25 through 27, of respondent's copy of the petition, there is a paragraph regarding Faretta motions that states, "Petitioner further informed the Trial Court that he had provided *written motion* papers to counsel for filing. Counsel that [sic] Petitioner had provided him with these motions."

The fact that the word "said" was inadvertently left out of the petition served on respondent and that petitioner *in propria persona* attempted to correct the statement by inserting the word "told," as well as how apropos the correction relating to the "written motion" is make it almost certain that this is the correction to which petitioner refers in the "Motion."

The reason that this is odd is that it would mean not only that the pagination of the petition referred to therein is different than that on the copy of the petition served on respondent but also that, at this early stage of the petition, petitioner's copy of the petition contains two extra pages that are not contained in the copy of the petition served upon respondent. It is difficult to divine the circumstances that would lead to the petition verified by petitioner to have more pages than served upon respondent. It is unclear what function the existence of those extra pages would possibly serve.

Respondent's theory seems to be borne out when one observes that in the "Motion," correction number 13 cites to page 17 as relating to the granting of *pro se* status. See Exh. A at 23. Although page 17 of the copy of the petition served upon respondent relates to petitioner's attempt to regain his *pro se* status after it had been

terminated, page 15 (derived at by deleting two extra pages) does indeed refer to the first time in which petitioner was granted "*pro per*" status.

However, the two page gap apparently widens with petitioner's corrections enumerated 30 through 32 contained on page 5 of the "Motion." There petitioner attempts to delete, successively, the words, "Financial hardship," "with whom he could have communicated and cooperated," and "mistakes," which petitioner states are all contained on page 37 of his petition. See Exh. A at 25. However, although no such language is contained at page 37 of the petition with which respondent was served, the corrections exactly relate to page 33 of respondent's petition. Thus, the implication is raised that, at this stage of the petition, petitioner's copy contained four extra pages not contained in the petition served upon respondent.

This "four extra pages" pattern can still be observed as late as petitioner's enumerated correction number 63 which purports to relate to page 56 line 4 and where petitioner sought to add "she did however pick a man, Jerome Van Houten, whom several other attack victims IDed, and all of the victims including Anderman IDed his car. Keith flatly refused to try to figure out how to subpoena a prisoner from state prison to court, to confront the woman he attacked." See Exh. A at 31-32. On page 52, lines 1 though 4 of the petition served on respondent, there is contained the pleading:

> (c) On July 30 and August 30, 1980, Ms. Andermann was shown a photograhic line-up and then a live line-up. In both instances, Ms Andermann failed to select Petitioner as her assailant.

As such, it is clear that it was to this paragraph that petitioner's "Motion" sought to add and therefore, that there is a disparity of there possibly being four extra pages

contained in the petition to which the "Motion" refers in contrast to the petition served on respondent.

By the point of petitioner's enumerated corrections 66 through 70, the gap grows to six extra pages. The "Motion" refers to the existence of the word "stripper" on page 62, line 1, to the wording "bothering her" and "kill him" as being on page 62, line 6, and seeks to "change 12 [sic] to 11" on page 62, line 13. See Exh. A at 33-34. As before, no such language appears on page 62 of the petition with which respondent was served. However, on page 56 of the petition at line 10 is the word "stripper" followed 5 lines later on line 15 with the wording "bothering her" and "kill her ex-boyfriend" and followed 7 lines later on line 22 with "twelve year old girl." Since these words bear the same spatial relation to all three notations made by the "Motion" yet ascribed as being on page 62, then clearly page 56 of the petition served upon respondent corresponds with page 62 of the document to which the "Motion" refers.

The "Motion" ends with an attempt to correct page 67, line 7 by adding verbiage. Since this correction, the enumerated 78, does not contain any language to "delete" it is not possible to pinpoint exactly it with reference to the petition served upon respondent. However, therein petitioner's attempts to amend what he perceives to be page 67 with language referring to Dr. Lunde. Dr. Lunde is indeed discussed in the petition served upon respondent but only five pages earlier on page 62. As such, the six page gap has reduced itself to five pages suggesting the occurrence of some type of deletion process.

A separate mystery pertaining to the two separate verifications is that petitioner's verification was signed upon April 23, 1997, one day after the signing of the verification by counsel Fred J. Fujioka. It would seem that if petitioner believed that he was only verifying the first fifteen claims of the petition, that counsel would

verify the final eleven claims after petitioner had verified the first claims and refused to verify the other claims.

Lastly, it seems odd that petitioner's motion corrects what it perceives to be pages 1 through 69 of the petition in fifteen pages of citations and corrections yet offers no corrections as to pages 63 through 100 of the petition served upon respondent. This, of course, could be only coincidence but it renders it unclear what petitioner saw with respect to these pages.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION UNLESS IT IS AUTHORIZED BY THE PETITIONER

This case is controlled by Lucky v. Calderon, 86 F.3d 923 (9th Cir. 1996). There, the petitioner's conviction was upheld by the California Supreme Court in 1988. In November of 1990, the Lucky's counsel commenced litigation in the Superior Court to determine his competency, an issue that would provide a sub-text to the question of authorization of the petition. Lucky's counsel proceeded by way of a motion for a hearing to determine petitioner's competency. Counsel's basis for the motion was that Lucky had failed and refused to meet with her, telephone her, write her or in any other manner communicate with her. Counsel also opined that she had no reason to believe that the refusal to have contact with her was generated by any dissatisfaction with her representation. The Superior Court apparently found these reasons to be insufficient to hold a competency hearing and denied the motion.

On February 1, 1991, counsel filed a federal habeas petition for writ of habeas corpus on Lucky's behalf and verified it personally on the basis:

> (1) he [Lucky] is incarcerated in Marin County at San Quentin State Prison; (2) of the emergency nature of this petition for writ of habeas corpus and application for issuance of a writ staying execution of his sentence; and (3) [that] these matters are more within my knowledge than his [Lucky's].

Litigation on the case proceeded for some four years without the verification ever being challenged when, in the midst of litigation to prove that Lucky was indeed incompetent, habeas counsel went so far as to argue that Lucky was so incompetent that she had herself verified his petition because "for the very reason that petitioner refused." Lucky at 925.

Obviously, this issue then became paramount to respondent who immediately moved to have the action dismissed as unauthorized. Then, in an affidavit dated July 14, 1995, Lucky's counsel stated:

> Petitioner had a February 8th [1991] execution date; he had not expressed in any way a desire to be executed, and I felt ethically bound to try to obtain a stay of his execution. When I could not get petitioner to sign the necessary papers, I verified the petition. Lucky at 925.

Next, the district court dismissed the petition "as unauthorized." Lucky immediately filed a motion for reconsideration. On August 31, 1995, Lucky filed an affidavit stating that "Ms. Knox [habeas counsel] is fully authorized to file and pursue this litigation or any other challenging my death judgment."

The Lucky Court held that "In the absence of evidence to the contrary, there is a presumption that a petitioner has been fully informed of, and has consented to, claims raised in the petition. Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994)." Lucky at 925. However, the Court found that Lucky's actions in refusing

to meet with his counsel or even communicate with her coupled with the lack of his verification was sufficient to "rebut the presumption" that he had consented to claims raised in the petition.

According to the Lucky Court, "the burden then shifted to Lucky to demonstrate that the petition was, in fact, authorized. He met this burden by filing the affidavit stating that his attorney was 'fully authorized to file and pursue' the litigation." Lucky at 925. The Court then acknowledged the correctness of respondent's procedural argument with respect to the belatedness of Lucky's authorization but held that this authorization was legally sufficient since at the time of the filing of the petition, its authorization was legally presumed, and Lucky's affidavit was only needed when evidence subsequently arose in 1995 casting doubt on whether Lucky had authorized the petition.

Here, the petition itself provides on its face clear evidence that petitioner has not consented to all of the claims raised in the petition. First, the verification by petitioner purports only to verify claims First through Fifteen (despite the language of the verification that petitioner is verifying information in the petition.) Secondly, the verification of counsel specifically pleads that petitioner "may be suffering from a mental disorder, condition or state which is presently preventing him from meaningfully assisting and communicating with counsel with regard to the Petition and, in particular, the Sixteenth through Twenty Seventh Claims for Relief. At this time, Petitioner is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief." Emphasis Added.

Next, the fact that petitioner purportedly verified claims one through fifteen only on April 23, 1997, one day after his counsel had verified the later claims, raises a

question as to whether petitioner consented to the later claims.

Additionally, there are reasons external to the petition that support respondent's assertion that the presumption that petitioner consented to the whole petition has been rebutted. Petitioner's "Motion to Correct Petition" casts grave doubt as to the contents of the petition to which petitioner referred when he made his verification. As stated above, in various points, the petition referred to in petitioner's "Motion" had language identical to language in the petition served upon respondent yet at various points on pages numbered two, four and six ahead of the numeration utilized in the petition served upon respondent.

Lastly, the "Motion" filed by petitioner, which in somewhat minute detail, criticizes pages 1 through 62 of the petition served upon respondent, mysteriously fails to make a single correction on pages 63 through 100. This also gives rise to substantial doubt that petitioner has consented to the whole petition and thus respondent has, as in Lucky, rebutted the presumption to that effect.

II.

PETITIONER MUST VERIFY A WHOLE PETITION OR, IN THE ALTERNATIVE, THE ACTION MUST BE DISMISSED

As stated above, in Lucky, once the Court found that there had been sufficient evidence presented overcoming the presumption that Lucky had consented to the filing of the petition, the burden shifted to Lucky to prove that the petition was authorized. Lucky satisfied this burden by presenting an affidavit attesting to the fact that he authorized all of his counsel's actions including the filing of the petition.

Here too, petitioner must meet his burden of proving that he has consented to the claims filed in his petition. However, petitioner's burden is made somewhat more difficult by reason of the fact that petitioner's

"Motion to Correct Petition" makes page references that do not coordinate to the petition served upon respondent.

In fact, as the matter stands now, petitioner did submit a document stating that he has "read the foregoing Petition and am familiar wit it s [sic] contents" and that the "information in the Petition is true and correct to the best of my knowledge, information, belief and understanding," yet this provides no assurance as to what "petition," petitioner is actually referring.

Indeed, given the mysterious circumstances surrounding the verification of the petition submitted on April 23, 1997, it may be that extraordinary procedures may have to be employed to assure that whatever petition petitioner purportedly verifies has been thoroughly read and approved by him.

It would not suffice for petitioner to simply send in a subsequent verification of claims sixteenth through twenty-seventh because, as shown by the disparity in the numbering of the pages as revealed by petitioner's "Motion to Correct Petition" there is no way of telling what petitioner would be verifying.

It is therefore clear that is necessary that petitioner file and verify either 1) an abbreviated petition to petitioner's liking that excludes the claims that his counsel averred he was incapable of verifying or, should petitioner undergo a change of heart and agree to consent to the filing of it, 2) a petition that includes all of the claims in the petition served upon respondent. But in either case, given the mysteries apparent in the contrast between the pagination of the petition apparently thought by petitioner to be verified by him and that served upon respondent, that some procedure has to be employed to reinstill confidence in the Court and respondent that petitioner personally is actually agreeing to consent to the filing of whatever petition is to be subsequently filed.

III.
THE TIME LIMITS CONTAINED IN THE AEDPA WOULD NOT PREVENT THE FILING OF AN AMENDED PETITION UNDER CERTAIN CIRCUMSTANCES

As stated above, upon April 24, 1996, President Clinton signed into law the Anti-Terrorist and Effective Death Penalty Act (AEDPA). That statute provided, inter alia, that actions under 28 U.S.C. § 2254 must be commenced within one year, generally, of finality of the conviction, tolled by any period of time during which the petitioner is engaged in pursuing state collateral relief. Petitioner's petition was filed on April 23, 1997, within one year of the enactment of the statute.

Should the defective petition filed by petitioner be dismissed as unauthorized, it does not appear as though a reasonably contemporaneously filed authorized amended petition that is either identical to the former petition in exact language and content or is the same petition minus certain allegations, and which, on the whole, represents no more change than is necessary to fully verify of the petition, would be barred as being outside the time limits of AEDPA.

It is clear that petitioner made a substantial effort to comply with the statute and did, in effect, file his entire petition on or before the expiration of the time limit. The dispute having to do with the authorization does not bear on the question of whether any claim therein is barred by any time limits contained in AEDPA.

Should petitioner file an amended petition that contains only the claims he is willing to verify or, in the alternative, should he fully verify the existing petition, his petition would be the same and the only addition to it in content and nature would relate to the authorization and verification only, a matter not offending the principles

underlying the promulgation of the time limits contained in AEDPA[2].

However, should petitioner and his counsel be unable to agree on verifying either the whole petition or a scaled down version of the petition which petitioner is willing to verify, and should petitioner's counsel then seek permission to file a petition as "next friend" to petitioner, respondent will certainly assert that such a petition would be barred by the time limits contained in AEDPA.

The latter is because a "Next Friend" petition would be a petition wholly different in nature from the petition that was filed within the time limits imposed by AEDPA even though it contains identical claims. Under Lucky, by operation of law, the petition purportedly filed was a petition presumably consented to by petitioner. A "Next Friend" petition would be one pursued by someone else on behalf of petitioner which would not, by law, require his consent.

The reason is simple. First, respondent submits that such potential "Next Friend" petitions are under the same AEDPA time limits as imposed upon normal petitions challenging convictions. There exists no provision in AEDPA providing for a longer time limit for persons filing these petitions as "Next Friends." This being true, if a counsel who knew long ago that he would have

---

2. Nor would there be any problems if certain claims were redrafted in order to obtain agreement between petitioner and his counsel on the question of authorization as long as the process is not utilized as an opportunity to put forth new claims alien either to the petition on file or that thought by petitioner to be verified by him. Of course, neither the Court nor respondent have, as of yet, actually seen the latter document if it is one, as now appears likely, that is indeed different from the one served upon respondent. If it is different, respondent and the Court would have to see it in order to determine whether or not claims in any amended petition that were not in the petition served upon respondent were actually stated in the petition that petitioner thought he was authorizing.

to move as "Next Friend" in order to pursue habeas relief on behalf of his client is under a one-year time limit to file as "Next Friend," there appears to be no logical reason to accept the proposition that a counsel who finds himself in a situation wherein his client refuses to verify a petition that counsel wants to file is entitled to any more time than the one-year limitation in which to file a "Next Friend" petition.

Secondly, the "Next Friend" petition, although possibly containing identical claims as in the original petition, is premised on such different considerations that it cannot be said that there is any identity of interests between the two sufficient to justify holding that the initial filing of the original petition to satisfy the requirements of the time limits of the statute.

CONCLUSION

For the stated reasons, this Court should either dismiss the action as unauthorized, or, in the alternative, compel petitioner and counsel to, from either the petition served upon respondent or that previously verified by petitioner, submit a petition the filing of which petitioner fully consents.

Dated: May 20, 1997

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

CAROL WENDELIN POLLACK
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

ROBERT S. HENRY
Deputy Attorney General

Attorneys for Respondent

RSH:rm
LA95XW0006

APPENDIX F

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Attorneys for Petitioner
DOUGLAS DANIEL CLARK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	CV 92-6567-RMT
Petitioner,	DEATH PENALTY CASE
vs.	NOTICE OF PEITITIONER'S OBJECTION TO CONTINUED REPRESENTATION BY APPOINTED COUNSEL
ARTHUR CALDERON, Warden of California Prison at San Quentin,	
Respondent.	

On June 5, 1997, counsel received from Petitioner Douglas D. Clark the letter attached hereto as Exhibit A. In his letter, Petitioner objects to appointed counsel's continued representation of him and requests that appointed counsel be discharged. Petitioner has requested that counsel bring this complaint to the Court's attention.

DATED: June 9, 1997

Respectfully submitted,

GOMEZ, FUJIOKA & FURUKAWA
FRED J. FUJIOKA
WILLIAM C. HSU, OF COUNSEL

By: //o.s.
Attorneys for Petitioner
Douglas Daniel Clark

Douglas Danial Clark,
C-63,000
Tamal, CA 94974

RECEIVED
JUN - 5 1997
Gomez, Fujioka &
Furukawa

U.S. DISTRICT COURT

Central District of California

Clark vs. Calderon, CV 92-6567 RMT

Death Penalty.

To Dep. Attorney General R. Henry, Judge Takasugi, and Fred Fujioka, re: fraudulent conduct of counsel regarding switching of several sections of the content of a death penaLty Writ of Habeas Corpus, in an overt effort to mislead the petitioner into allowing a fraud to be perpetrated upon this Court.

Fujioka was told in writing and on several occasions that sections of his brief were wrong, false, or otherwise NOT going to be signed under any circumstances. He was told if he brought this "garbage" to be signed it would be torn out of the writ, before I signed it. He AGREED to remove the false, misleading, offensive segments, sent me a modified copy marked "draft". It was still "CRAP", but when he arrived and threatened me with loss of ALL federal review if I did not sign, I agreed to sign just part of the brief numbered page 1 to 70. There were several parts removed, per the draft I read then and signed.

I now get a copy of what purports to be MY Under Oath signed writ. It does not at all comport with

what I signed. Not only is the whole last half submitted against my declared ORDER to counsel, but he rewrote the entire first part and REENTERED what I specifically was told would be removed, was removed when I signed it, and now is filed. The lawyer flat out lied to me and coerced me into signing what he would later change, which is ILLEGAL when done to a document sworn to be accurate and read and approved by a person under penalty of perjury.

Fujioka is a criminal, and a lawyer who cannot be trusted to file what he lies to his client about presenting to the court.

I warned you. This man is NOT fit to handle this task. He is ethically incapable of handling a life and death effort without lying, falsifying documents, and doctoring his own sworn declaration under oath.

He should reside in San Quentin, not visit ME here.

Until the court sanctions and fires this crooked lying lawyer I will not be working with him as "counsel." I will be informing the prosecution-owned and controlled "State Bar" about this illegal string of actions. The man is literally out of control.

I asked this court and the state bar to confirm that a client has a legal right to require counsel to give his "legal advice" in a form (tape or letter) which can be retained for later reference. Thus the client may rely upon the lawyer's issuance of advice, if need be, to prove he acted in accordance with counsel's guidance. All too often counsel will blame the client for ordering him to act in ways which later prove to be counter to the client's best legal interests. (Such as NOT preparing

this writ for years, then throwing together this trash at the last moment.) Counsel now is proved to have conducted himself in criminal ways that he is sure to try to slide out from under by claiming I am stupid, insane or a pain in the neck. If this court had just recognized my RIGHT to retain a copy of counsel's advice, as requested by me and refused by Fujioka, we would simply pull out the tape of that meeting (brief as it was) and you all would see the man is a corrupt lawyer seeking to cover himself at my expense.

As usual, courts give the LAWYER all the rights, to cover his criminal conduct, and the client gets screwed by the lawyers on both sides and in the robe. No surprise there.

I am officially still awaiting STATE WRIT OF HABEAS CORPUS, I have filed in FEDERAL COURT to get an order to have it COMMENCE, (see Clark vs. Vasquez CV 91-3608 JSL, which Fujioka is clueless about.) I have demanded a state writ commence, under the law in Coe Vs Thurman, and until the FEDERAL COURT acts or the state court concedes, I do not believe this court has any INITIAL JURISDICTION. Besides which, this court has yet to respond or act on my prior filings about jurisdiction. If there has been no state level review, as I contend, on direct or writ, then this instant petition is not validly filed, either.

If I have to go back and suffer a new half-decade delay as the state plays games with the state writ of habeas corpus, just to get rid of this criminal you guys call my COUNSEL, then so be it. No one would listen for 14 years about Max Keith being a drunken incompetent thief and liar. Now he is disbarred, and no one says "sorry we didn't listen." I am

telling you. This lawyer Fujioka is a crook, liar, he has broken the LAW, and court rules, and canon of ethics. Keep on ignoring him... but you are going to face up to this man's criminal acts and incompetence eventually.

Sincerely,

{original signed)

Douglas Daniel Clark,
Petitioner,
CV 92 6567 RMT

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Blecher & Collins, P C., 611 W. Sixth Street, 20th Floor, Los Angeles, California 90017.

I am readily familiar with the business practice of Blecher & Collins for the collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day that it is collected and processed in the ordinary course of business.

On June 10, 1997, I served the foregoing document on the interested parties by placing a copy of said document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below:

Daniel Lungren, Attorney General
of the State of California
George Williamson, Chief Asst.
Attorney General
Carol Wendelin Pollack, Senior
Asst. Attorney General
Keith E. Borjon, Supervising
Deputy Attorney General
Robert S. Henry, Deputy Attorney General
300 S. Spring Street, 5th Floor
Los Angeles, California 90013

The envelope was sealed and placed for collection and mailing on that date following the ordinary business practice of Blecher & Collins.

I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing contained in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this proof of service is executed on June 10, 1997, at Los Angeles, California.

//orig.signed
Diana Craven

APPENDIX G

ENTER

FILED
JUNE 30, 1997

DOUGLAS CLARK
C-63,000
TAMAL, CA 94974
PETITIONER

I here certify this document was served by first class mail postage prepaid to all counsel (or parties) at their respective most recent address of record in this action on this date.

DATED: 6-30-97
//orig.signed
Deputy Clerk

RECEIVED BUT NOT FILED
JUNE 26, 1997
CLERK, DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK	CV-92-6567 RMT
Petitioner,	DEATH PENALTY
v.	PETITIONER'S ACTUAL
ARTHUR CALDERON, Warden of San Quentin Prison,	OPPOSITION TO FUJIOKA'S PERJUROUS DOCUMENTS FILED APRIL 23, and
Respondent.	JUNE 16, 1997

C17

PETITIONER totally rejects as false, fraudulent and perjurous the documents Fred Fujioka caused to be filed over my sworn verification April 24, 1997, and the totally misleading and false claims in his filing in behalf of "'Petitioner" but without my knowledge, approval or consent, on JUNE 16, 1997. His attempt to pretend the petition I signed on April 23, 1997 was NOT the final one he told me was to be filed EXCLUDING several portions of what he now pretends is a virtual mirror of what I signed is a fraud upon this Court, and a CRIME in the State of California. He should be sanctioned, dismissed, and a hearing regarding the search for truly independent and competent counsel held.

Facts:

Mr Fujioka and I debated heatedly the content of the "drafts" he proposed I consider to be my Petition. The Court knows I feel strongly that Fujioka has xeroxed a few feebly presented issues from the state public defender's "AOB" below, and expects this to justify his pay.

In particular for example I strongly protested his malicious use of a totally false claim about an imagined threat to attack trial counsel by myself as presented in his drafts. Fujioka brought the copy of the FINAL petition which did NOT contain this fraudulent, damaging nonsense. It appears back in the brief he filed, at page 28. The man flat out LIED to me, said he was deleting it, I checked the copy, I replied to THAT copy (see state's motion proving this.) Then Fujioka took a sworn declaration under perjury, which is a legal document I personally and specifically verified for filing in my name in a life and death matter, and this CRIMINAL changed the brief to HIS liking, and

(27)

committed a felony and fraud on the Court by filing it as authentic. (see Calif. Penal Code §132 for precisely the felony committed by counsel.)

Fujioka's personal and lawyerly EGO has been a problem from the start. He has NO experience in this complex and grueling work. He thought he could walk into death case writ work and collect huge fees by merely xeroxing the completed work by prior counsel. He would NOT let a mere CLIENT tell him NO, this was NOT going to be dumped into this court record in my name. Below, the state high court has nothing but total contempt for Faretta vs. California. That court is still trying to claim it does not exist, and counsel are GODS on state-level appeals. The client is gagged. Forced to have counsel, then gagged BECAUSE they have counsel. (see section K of the decision below in THIS CASE.)

But here in federal court I will NOT be told my counsel is god, nor that he can lie to the court or such as the pack of deceits filed June 16, in MY NAME.

JUNE 16th FILING PERJURY:

Fujioka specifically tries to pass the lie off onto the Court that this brief he filed contains what I signed, within the first FIFTEEN issues. That is a flat out LIE. PAGE 2, line 13: I demanded and GOT a different brief, which I then signed. He switched it. He knows full well he DID NOT "inform" me of this version being filed, he intentionally deceived me into believing he was NOT filing it. Page 3 part two. That is flat out perjury. I did NOT sign NOR verify that brief.

Pg 4 Fujioka admits he switched briefs. He then enlists Hsu in this pack of lies, by claiming they did NOT bring the "final copy" up to be signed, but had me

sign a "draft" they substantially edited. That was all done on April 23, between signing and filing? That is perjury.

The "April 3 draft" had the offensive language in it I ordered him to remove or I would not sign it. To get my signature on ANY verification form, he presented the brief as I ordered him to excise it, and then simply switched the NOTABLY UN-NUMBERED verification page!

Fujioka's theory of "law" that a witness may file WRITS OF HABEAS CORPUS, in the name and for the unwilling actual person in prison, simply because "counsel, not petitioner, is in the best position to verify the (issues.)" This would suddenly reverse the U.S. Supreme Court's long line of cases where the PETITIONER ALONE is the one to seek, or NOT SEEK, the filing of petitions. This would surely apply to the concept Fujioka proposes: if a petitioner wished a limited petition (I seek a MUCH MORE VAST ONE) and counsel wished to file endless lists of issues he "perceives" therefore must be allowed to file, we would have to see a long strong line of case law tumble.

It is clear Fujioka's ego was bruised. He did NOT like his xeroxed copies from the state public defender's briefs being edited by a mere layman. He arrogantly decided: Force prosecute criminal conduct even he himself discovered before I was aware Fujioka committed it. Within In re Carpenter, 9 Cal 4 --- the state prosecutor said he will never prosecute criminal conduct within a criminal case if it harms his chances to win the appeal. So be it. But the federal court need not bow to the state's immunization of this lawyer's felonious conduct. (4)

I want to see this man off this case, disbarred, tried, convicted and jailed. If that is not a conflict, caused by the CRIMINAL ACTIONS by counsel AGAINST me, then what is?

I served this upon both Robert Henry and Fred Fujioka at their respective addresses of record, this 23rd day of JUNE, 1997, by dept. of corrections staff delivery to U.S. 1st Class MAIL in envelopes to which I attached sufficient postage.

All the foregoing is true and correct and REALLY what I did in fact SIGN, I swear under penalty of perjury, at San Quentin, CALIFORNIA.

//O.S.
DOUGLAS CLARK,

PETITIONER.

(when the executive branch allows meaningful law library and copies, I will serve three upon the court.)

(5)

APPENDIX H

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Attorneys for Petitioner
DOUGLAS DANIEL CLARK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DOUGLAS DANIEL CLARK, Petitioner, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent.	CV 92-6567-RMT DEATH PENALTY CASE PEITITIONER'S OPPOSITION TO MOTION TO DISMISS PETITION AS UNAUTHORIZED, OR, IN THE ALTERNATIVE, TO COMPEL FULL VERIFICATION BY PETITIONER Courtroom: 22 (Honorable Robert M. Takasugi Date: N/A Time: N/A

Petitioner Douglas Daniel Clark ("Petitioner") submits the following Opposition to Respondent Arthur Calderon's ("Respondent") motion to dismiss petition as unauthorized, or, in

the alternative, to compel full verification by petitioner.

I.

PRELIMINARY STATEMENT

On April 23, 1997, a Petition for Writ of Habeas Corpus ("Petition") was filed on behalf of Petitioner. In his motion, Respondent seeks an order dismissing the Petition as unauthorized or, alternatively, an order which requires Petitioner to fully verify the Petition. Respondent's motion is grounded on the implied assertion that Petitioner was not informed of or did not actually consent to the filing of the Petition, and that counsel for Petitioner is attempting to commit fraud on the Court.

Respondent's assertions are frivolous and outrageous. Contrary to the self-serving and skewed conclusions drawn by
Respondent, the record shows that Petitioner was informed of the Petition and that Petitioner, however begrudgingly, agreed to its filing. In fact, Respondent's primary "evidence" of non-authorization (i.e., Petitioner's "Motion To Correct Petition") demonstrates, on its face, that the Petition was authorized.

Respondent's motion has been filed for purely tactical reasons. It is intended to exploit the contentious relationship between Petitioner and his counsel. Respondent's strategy is as transparent as it is improper. Confronted with the Petition and the clear constitutional violations raised therein, Respondent has issued an open invitation to Petitioner to reject what has already been filed and verified. No doubt Respondent hopes that because of the tension between Petitioner and his counsel, Petitioner and counsel will be unable to reach agreement on a subsequent form of Petition. As

Respondent makes clear in his motion (at 16-19), he then intends to argue that any attempt by counsel or Petitioner to file a Petition is procedurally barred or time barred under the Antiterrorism and Effective Death Penalty Act (AEDPA).

As discussed below, Respondent's motion is meritless It is an improper attempt to create a procedural mousetrap, nothing more. The motion should be denied.

II.
FACTS RELATING TO FILING OF PETITION AND VERIFICATION THEREOF

The pertinent facts leading to the filing and verification of the Petition are as follows.

(1) Prior to April 23, 1997, counsel provided Petitioner with drafts of the petition for writ of habeas corpus. The draft petitions which were provided to Petitioner identified the claims for relief which counsel intended to raise in the Petition. (Declaration of Fred J. Fujioka ("Fujioka Decl."), attached hereto as Exhibit 1, at ¶ 2.)

(2) Petitioner indicated that he would personally verify only some of the claims for relief set out in the draft petitions. Specifically, Petitioner appeared to indicate that he would personally verify those claims for relief ultimately set out in the Petition as the First through Fifteenth Claims for Relief. (Id. at ¶ 3.)

(3) On or about April 3, 1997, counsel sent to Petitioner another draft petition containing the claims for relief which Petitioner had indicated he would personally verify (hereinafter "April 3 Draft"). These claims were denominated in the April 3 Draft as the First through Fifteenth Claims for Relief. The constitutional challenges and facts raised in these

claims virtually mirror, in all material respects, the First through Fifteenth Claims for Relief raised in the final form of the Petition filed with the Court. Petitioner was asked to personally verify these claims. (Id. at ¶ 4.)

(4) After April 3, counsel continued to prepare a petition with the expectation that it would be filed with the Court no later than April 23, 1997. (Id. at ¶ 5.)

(5) As of April 22, counsel had not yet received Petitioner's personal verification for the First through Fifteenth Claims for Relief raised in the Petition. Given this, counsel anticipated verifying the Petition on behalf of Petitioner. For that reason (and because counsel was scheduled to meet with Petitioner the next day), counsel signed the Petition and verification on April 22. (Id. at ¶ 6.)

(6) During the morning of April 23, counsel met with Petitioner at San Quentin, California. At that time, Petitioner personally verified a copy of the April 3 Draft. As noted above, the constitutional challenges and facts raised in these 15 claims virtually mirror, in all material respects, the First through Fifteenth Claims for Relief raised in the final form of the Petition filed with the Court. (Id. at sq 7-8.)

(7) At the time Petitioner verified the First through Fifteenth Claims for Relief, Petitioner provided counsel with a written statement to the effect that he believed these claims were inadequately pled, incomplete and reflective of counsel's gross incompetence. That statement of protest was filed with the Court on April 24, 1997. A copy is attached hereto as Exhibit 2.[1] (Id. at ¶ 9.)

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1. Petitioner's comments and objections were originally filed under seal and ex parte with the Court. However, counsel understands that Petitioner has personally sent a copy of the filing to the Attorney General for his information, and has indicated that his comments and objections were not intended to

(8) Upon obtaining Petitioner's personal verification, counsel was required to re-format the verifications of Petitioner and counsel in order to clearly indicate that Petitioner had personally verified the First through Fifteenth Claims for Relief, while counsel had verified the Sixteenth through Twenty- Seventh Claims for Relief on Petitioner's behalf. (Id. at ¶ 10.)

(9) On or about April 24, Petitioner prepared a Motion To Correct Petition. A copy is attached hereto as Exhibit 3. The comments contained therein correspond to the April 3 Draft personally verified by Petitioner on April 23. (Id. at ¶¶ 11- 12.)

(10) The comments contained in the Motion To Correct Petition do not correspond exactly with the final form of the Petition filed with the Court. The reason for this is that the April 3 Draft was a draft document and not intended to be "camera ready" for filing purposes. For filing purposes, the April 3 Draft was re-formatted, proofread and edited. As a result, the pagination, numbering and wording contained in the April 3 Draft differs somewhat from the final form of the Petition. (Id. at ¶ 13.)

(11) The 15 substantive claims for relief set forth in the April 3 Draft which were personally verified by Petitioner were not substantively change [sic]. The First through Fifteenth Claims for Relief set forth in the final form of the Petition filed with the Court correspond in all material respects to those 15 claims for relief. (Id. at ¶¶ 3-4, 8, 13.)

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be filed under seal and were to remain public.

III.
THE PETITION WAS AUTHORIZED

Respondent's factual assertion that the Petition is unauthorized is meritless. Counsel's declaration, Exhibit 2 and Exhibit 3 clearly demonstrate that Petitioner met with counsel regarding the Petition; that Petitioner was informed of the substantive claims counsel intended to raise; that Petitioner personally verified the First through Fifteenth Claims for Relief; that Petitioner understood that the Petition would be filed; and that Petitioner (however begrudgingly) consented to the Petition's filing.

The lack of merit regarding Respondent's assertion is highlighted by his reliance on Petitioner's "Motion to Correct Petition" which was personally prepared by Petitioner a day after the filing of the Petition. This Motion, on its face, states that Petitioner met with counsel on April 23 regarding the Petition and evidences that Petitioner was informed of its filing.

Moreover, although Respondent claims that the pagination, numbering and wording referenced in Petitioner's Motion do not match up exactly to the Petition, there is no claim that Petitioner's comments do not relate to the substantive claims and issues raised in the First through Fifteenth Claims for Relief. This is because a review of those comments readily reveals that Petitioner's Motion directly relate to the First through Fifteenth Claims for Relief.

For these reasons, Lucky v. Calderon, 86 F.3d 923 (9th Cir. 1996), is wholly inapplicable to the instant case. In Lucky, the issue confronting the trial court was whether petitioner had ever impliedly or expressly authorized the filing of any petition on his behalf. The trial court found that petitioner had never been informed of or consented to the filing of a petition; nor

had petitioner spoken or communicated with his counsel regarding the filing of a petition. On the basis of these specific facts, the trial court concluded that the petition which had been verified by counsel was, in effect, "unauthorized." Id. at 925.

In stark contrast to the facts of Lucky, the record in this case shows, among other things, that Petitioner has met with and responded to counsel regarding the Petition, that Petitioner has personally verified the First through Fifteenth Claims for Relief, and that Petitioner is not only aware of the Petition but interested in actively and affirmatively pursuing it. Indeed, Petitioner has been unable to locate any case in which a petition was found to be "unauthorized" under facts or circumstances similar to those existent here.

Unlike the facts in Lucky, this is not a case where, arguably, the putative petitioner has chosen to forego or waive his right to appeal his conviction and sentence. To the contrary, the record clearly shows that Petitioner wishes to aggressively pursue his Petition. Instead, the record in this case evidences only that there is a disagreement between Petitioner and counsel as to how to portray or plead various claims for relief, as well as some disagreement over the legal merits of various claims. However, these sorts of disagreements potentially exist whenever counsel is appointed to represent an indigent habeas petitioner.

As noted by the Ninth Circuit in Jeffers v. Lewis, 68 F.3d 295, 297-98 (9th Cir. 1995), vacated on other grounds, 68 F.3d 299 (9th Cir. 1995), in appointing counsel to represent Petitioner, the Court impliedly recognized that the case before it is complex and that Petitioner cannot adequately present that case on his own. See also Anderson v. Heinze, 258 F.2d 479 (9th Cir.), cert. denied, 358 U.S. 889 (1958). Thus, it should not be unexpected, nor surprising, that Petitioner may disagree with counsel's legal presentation and

pleading of claims under which Petitioner is entitled to federal relief. The fact, however, that Petitioner believes that various claims for relief are badly or inadequately pled (or even meritless) does not permit or require the Court to find that the Petition was "unauthorized" within the meaning of Lucky. Such a conclusion would completely undercut the basic "interests of justice" which necessitated the appointment of counsel in the first instance. Id. at 297; Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).

IV.
THE SIXTEENTH THROUGH TWENTY-SEVENTH CLAIM WERE PROPERLY VERIFIED BY COUNSEL

As an alternative to its request that the Petition be dismissed as "unauthorized," Respondent appears to suggest that Petitioner must be required to personally verify the Sixteenth through Twenty-Seventh Claims for Relief. This request should be denied insofar as those claims have been properly verified by counsel for Petitioner.

28 U.S.C. § 2242 provides, in relevant part, that an "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." However, it is well established that even in the absence of Petitioner's personal verification, the Court may address the merits of an unverified petition. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

In determining whether to do so, the Court should consider the purpose behind the verification requirement, namely, to ensure that the claim presented is bona fide and supported by some evidence. Cf.

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373, 86 S. Ct. 845, 854 (1966)(dismissal of otherwise bona fide case improper even where person verifying complaint testified she had no personal knowledge or understanding of facts set forth in the complaint). The requirement of verification, like other federal rules, should be interpreted and applied to "to further, not defeat the ends of justice." Id.

The Sixteenth through Twenty-Seventh Claims for Relief raise various constitutional challenges. Many of these claims are entirely legal in nature and based on the underlying record. To the extent that they are based upon facts extrinsic to the underlying record, those facts were obtained by counsel during the course of their pre-petition investigation. Thus, whether or not these claims present non-frivolous, colorable federal constitutional issues are questions uniquely within the purview and knowledge of counsel and not Petitioner.

For these reasons, counsel, not Petitioner, is in the best position to verify the Sixteenth through Twenty-Seventh Claims for Relief. The verification of the claims by counsel is consistent with the basic "interests of justice" which required the appointment of counsel in order that this case be adequately and properly presented to the Court. There is no reason why the Court, in the interests of justice, should not consider these claims in light of their verification by counsel.

V.
CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that Respondent's motion be denied.

DATED: June 16, 1997

Respectfully submitted,

GOMEZ, FUJIOKA &
FURUKAWA FRED J. FUJIOKA

WILLIAM C. HSU, OF COUNSEL

By ___//o.s.___
FRED J. FUJIOKA
Attorneys for Petitioner
Douglas Daniel Clark

[habeas\hcmot.opp]

DECLARATION OF FRED J. FUJIOKA

I, FRED J. FUJIOKA, declare as follows:

1. I am an attorney licensed to practice in the State of California and am a member of the Bar of this Court. I am one of the court-appointed counsel for DOUGLAS DANIEL CLARK ("Petitioner") in the instant federal habeas corpus proceeding. I submit this declaration in support of Petitioner's Opposition to Respondent's motion to dismiss petition as unauthorized, or, in the alternative, to compel full verification.

1. I have personal knowledge of the following matters. If called to testify, I would testify competently thereto.

2. Prior to April 23, 1997, Petitioner was provided with drafts of the petition for writ of habeas corpus which identified the claims for relief which counsel intended to raise in the Petition.

3. Petitioner appeared to indicate that he would personally verify some of the claims for relief set out in the draft petitions. The specific claims for relief which Petitioner appeared to indicate that he would personally verify are those which are set out in the final form of the Petition as the First through Fifteenth Claims for Relief.

4. On or about April 3, 1997, I sent to Petitioner another draft petition containing the claims for relief which he had indicated he would personally verify. These claims were identified in the draft petition as the first through fifteenth claims for relief. The constitutional challenges and facts raised in these claims mirror, in all material respects, the First through Fifteenth Claims for Relief set out in the final form of the Petition filed with the Court. I asked Petitioner to personally verify these claims.

5. After April 3, I and co-counsel, Mr. Hsu, continued to edit, format and generally clean up the Petition with the expectation that it would be filed with the Court no later than April 23, 1997.

6. As of April 22, I had not yet received Petitioner's personal verification for the First through Fifteenth Claims for Relief of the Petition. Given this, I anticipated that I would have to verify the Petition on behalf of Petitioner. For that reason (and because I was scheduled to meet with Petitioner the next day), I signed the Petition and verification on April 22, with the understanding that Mr. Hsu would finalize it for filing on April 23.

7. During the morning of April 23, I met with Petitioner at San Quentin, California. At that time, Petitioner personally verified a copy of the draft petition which had been sent to him on or about April 3, which contained the 15 claims for relief he had originally indicated he would personally verify.

8. As I noted above, the constitutional challenges and facts raised in these 15 claims virtually mirror, in all material respects, the First through Fifteenth Claims for Relief set out in the final form of the Petition filed with the Court.

9. At the same time, Petitioner gave me a written statement which, in effect, states that he believes these 15 claims were inadequately pled, incomplete and reflective of his counsel's gross incompetence. Petitioner's statement of protest was filed with the Court on April 24, 1997, and is attached as Exhibit 2 to the Opposition. Based on conversations with Mr. Hsu, I am informed that this filing was subsequently sent to Respondent by Petitioner.

10. After obtaining Petitioner's personal verification, I rushed back to Los Angeles during the afternoon of April 23. At that time, Petitioner's verification as well as my own were reformatted so as to

clearly indicate that Petitioner had personally verified only the First through Fifteenth Claims for Relief and that I was verifying the Sixteenth through Twenty Seventh Claims for Relief on his behalf.

11. On or about April 28, 1997, I received a "Motion To Correct Petition" prepared by Petitioner and which petitioner filed directly with the Court. A copy of the Motion To Correct Petition is attached as Exhibit 3 to the Opposition.

12. The Motion To Correct Petition appears to have prepared the day of or after my April 23 meeting with him. The comments contained therein correspond to the draft version of the petition I sent to him on or about April 3.

13. The comments contained in the Motion To Correct Petition do not correspond exactly to the final form of the Petition filed with the Court. This is because the pagination, paragraph numbers and wording in the draft petition sent to Petitioner on April 3 do not correspond exactly with the final form of the Petition filed with the Court. The reason for this is self-evident. The former was a draft document and not "camera ready" for filing purposes. Prior to filing, it was re-formatted, proofread and edited several times. Once this occurred. its form changed in terms of pagination, numbering and wording.

14. What did not change, however, were the 15 substantive claims for relief personally verified by Petitioner and the constitutional challenges raised therein. The First through Fifteenth Claims for Relief set forth in the final form of the Petition filed with the Court reflect and correspond directly to those 15 claims for relief.

I declare under penalty of perjury under the laws of the United States of America that the-foregoing is true and correct.

Executed this 16th day of June, 1997 at Los Angeles, California.

//

FRED FUJIOKA

[habeas\decl.ff]

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Attorneys for Petitioner
DOUGLAS DANIEL CLARK

FILED
CLERK, U.S. DISTRICT COURT
APRIL 24, 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK, Petitioner, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent.	CV 92-6567-RMT DEATH PENALTY CASE PETITIONER'S COMMENTS AND OBJECTIONS RE COUNSEL'S PREPARATION AND FILING OF "PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY"

FILED EX PARTE AND UNDER SEAL

WITHOUT NOTICE PURSUANT TO LOCAL

RULE 7.18.2

On April 23, 1997, a "PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY" was filed by and on behalf of Petitioner. In connection with that filing, Petitioner wished

to make the Court aware of the facts attached hereto as Exhibit 1. In accordance with Petitioner's wishes, counsel hereby notifies the Court of Petitioner's views.

DATED: April 23, 1997

Respectfully submitted,

GOMEZ, FUJIOKA & FURUKAWA
FRED J. FUJIOKA

WILLIAM C. HSU, Of Counsel

By: _____
William C. Hsu
Attorneys for Petitioner
Douglas Daniel Clark

[HABEAS\NOTICE]

April 21, 1997

Judge Takasugi:

Fred Fujioka has not read the case files, transcript, or court filings in this case. He cannot intelligently discuss any facts or legal procedures in this matter.

Now, he comes to me in a panic with a worthless writ listing only a scant few issues, most WRONGLY defined, all WEAK as possible. He threatens me with McCLESKEY and the Anti-Terrorism Death Penalty Act, saying if I do not sign away all my 54 best issues, by SIGNING THIS GARBAGE he offers Up, I lose ALL writ rights. This SUCKS. I am forced to accept incompetent counsel who did NOTHING, then when a deadline comes upon him, he willingly forces me into a Catch 22 posture: sign this, as your TOTAL LIST (McCleskey) or you get NONE.

This is foul, unconstitutional, and defies my rights to be heard on those issues I wrote about (state public defender, and unconfirmed justices.) I have a right to adequate counsel for SCORES of issues not filed because Deukmejian and Wilson maliciously tampered with my "counsel." (SPDO.)

If this VISE between McCleskey and the new Death Penalty rules is as Fred says, and I must now sign away my rights to a FULL hearing because he screwed around for three years or more, then this is contrary to the "interests of justice" and my "due process rights," "Equal protection", and all basic rights.

I sign this piece of GARBAGE only because I am told I lose ALL rights to ANY hearing, if I don't sign this useless stack of drivel he copied out of the state lawyer's brief.

If this is justice, why bother having a hearing at all? This is disgusting, I hope the tax payers get wind of what this sleazy lawyer did. He ripped of [sic] 99% of every dollar he was paid. I intend to tell anyone who will listen, as soon as I get a chance. This is FRAUD on the taxpayer to call this trash a "writ." This case has the fewest issues of any simple murder case to reach this level- Yet this is a hugely complex case. The reason is clear: Fujioka is a sick joke perpetrated upon me and this court by Michael Millman, previously my lawyer's supervisor at St. Public Defender, now at CAP.

I wish I had more faith in JUSTICE, I would throw this crap in the trash and see what happens when NO writ at all is filed. But knowing Fujioka, he will advocate that result.

Signed under protest, the issues are badly defined, WRONG, feeble and only 15% of the issues that require briefing when I get the files.

Douglas Clark,
Petitioner under adamant PROTEST
signed totally against my will due to

MALICIOUSLY INCOMPETENT COUNSEL.

I declare under penalty of perjury I will file this three page document with Clark's "writ" to the court, signed this 23 day of April, 1997.

_____

Fred Fujioka, Attorney at Law

APPENDIX I

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON,
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CAROL WENDELIN POLLACK,
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Attorneys for Respondent

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	NO. CV 92-6567 RMT
Petitioner	[DEATH PENALTY CASE]
v.	
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	REPLY TO "PETITIONER'S OPPOSITION TO MOTION TO DISMISS PETITION AS UNAUTHORIZED, OR, IN THE ALTERNATIVE, TO COMPEL FULL VERIFICATION BY PETITIONER"
Respondent.	Hrg: June 30, 1997 VACATED Time: 9:30 a.m. Courtroom: 22

Table of Contents

	Page
MEMORANDUM OF POINTS AND AUTHORITIES	2
ARGUMENT	
I REPLY TO PETITIONER'S "PRELIMINARY STATEMENT"	2
II REPLY TO PETITIONER'S "FACTS RELATING TO FILING OF PETITION AND VERIFICATION THEREOF	5
III PETITIONER MUST VERIFY THE WHOLE PETITION, NOT JUST PART OF IT	6
CONCLUSION	14

DANIEL E. LUNGREN, Attorney General
of the State of California
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	NO. CV 92-6567 RMT
Petitioner	[DEATH PENALTY CASE]
v.	
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	REPLY TO "PETITIONER'S OPPOSITION TO MOTION TO DISMISS PETITION AS UNAUTHORIZED, OR, IN THE ALTERNATIVE, TO COMPEL FULL VERIFICATION BY PETITIONER"
Respondent.	Hrg: June 30, 1997 VACATED Time: 9:30 a.m. Courtroom: 22

Respondent hereby files this reply to "Petitioner's Opposition to Motion to Dismiss Petition as Unauthorized, or, in the Alternative, to Compel Full

Verification by Petitioner," hereinafter referred to as "Opposition," filed on or about June 16, 1997.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

REPLY TO PETITIONER'S "PRELIMINARY STATEMENT"

Petitioner includes in his Opposition a "Preliminary Statement" that completely baffles respondent. Therein, petitioner alleges that respondent's motion "is grounded on the implied assertion that Petitioner was not informed of or did not actually consent to the filing of the Petition, and that counsel for Petitioner is attempting to commit fraud on the Court." Opposition at 2.

Taking the last point first, respondent neither stated, implied, nor intended to imply, that counsel for Petitioner was attempting to commit any fraud upon this Court. Respondent sincerely regrets it if this Court shares petitioner's view that respondent was suggesting this.

As to the first half of the first point, that respondent was implying that petitioner "was not informed" of "the filing of the petition," it is self-apparent from the verification of the petition that petitioner knew that a petition was being filed. As such, neither respondent or anyone else could maintain or imply that petitioner may not have been informed of "the filing of the petition."

As to the last half of the first point, that respondent was implying that petitioner "did not actually consent to the filing of the Petition," it is also self-evident from all the facts in 1) the petition, 2) petitioner's "Motion to Correct Petition," and, 3) the Opposition, that petitioner did not and still does not consent to the filing of the <u>whole</u> petition even though he has authorized some of it. Petitioner readily concedes this.

As will be seen in the points and authorities below, this is the "sticking point" between petitioner and respondent in this motion. Petitioner obviously believes that as long as the petitioner consents to the action, i.e., the "filing of the petition," that, regardless of its contents, the requirement that the petition be authorized has been satisfied. Respondent, on the other hand, maintains that the petitioner must consent to and authorize, and thus verify, the whole petition, not just part of it.

This dispute also defines the sum and substance of petitioner's second paragraph of his "Preliminary Statement" wherein he argues that petitioner's "Motion to Correct Petition," which he characterizes as "Respondent's primary 'evidence' of non-authorization[1], demonstrates that petitioner authorized the petition. Opposition at 2. However, this "Motion to Correct Petition," was only evidence that petitioner consented to a part of the petition. It provided no evidence of his consent to the part of the petition that counsel verified but petitioner refused to authorize and correspondingly, it provides no evidence that the petitioner consented to the whole petition as an integrated document.

In the next paragraph of his "Preliminary Statement," petitioner launches his severest, and most unfair, attack on respondent. Petitioner accuses

---

1. Actually, petitioner is wrong. Respondent did not rely on the "Motion to Correct Petition" as evidence that petitioner did not authorize the petition. Respondent was merely expressing its confusion concerning the page references in the motion as contrasted to the actual wording of the petition on those pages. In fact, clearly respondent did not need to rely on that motion to either discover or illuminate petitioner's refusal to authorize the petition. That disagreement came to respondent's attention by virtue of reading counsel's verification of the latter half of the petition which implied that petitioner had flatly refused to verify the claims contained in the last portion of the petition (a deduction borne out by this Opposition wherein counsel for petitioner concedes as much).

respondent of filing the motion for purely tactical reasons, i.e., "to exploit the contentious relationship between Petitioner and his counsel" and in "hopes that because of the tension between Petitioner and his counsel, Petitioner and counsel will be unable to reach agreement on a subsequent form of Petition." Opposition at 2.

This allegation is untrue and unfair. The sole "reason" that respondent filed this motion, which the rest of this document will be devoted to explicating, would be obvious to even petitioner were he not so absorbed in the heat of battle. It is simply that unless the petition is authorized, the entire proceedings can be deemed invalid and any judgment obtained on the petition can be declared a nullity.

Neither petitioner nor respondent, nor the Court has any desire to engage in years of useless litigation of a petition that was litigated, appealed, and affirmed, but nullified by the Ninth Circuit because it was never authorized by the inmate.

Lastly, respondent is even more baffled by petitioner's parting shot that "As Respondent makes clear in his motion (at 16-19), he then intends to argue that any attempt by counsel or Petitioner to file a Petition is procedurally barred or time barred under the Antiterrorism and Effective Death Penalty Act (AEDPA)." Opposition at 2-3.

Again, petitioner is flatly wrong. Respondent, in fact, stated the contrary and, in a not only unusual but unsolicited concession, stated that it was its view that any subsequent agreed upon amended petition would <u>not</u> be barred by the statute of limitations contained in "AEDPA" as long as all claims therein were either in the petition filed or that verified by petitioner. Respondent only stated that if counsel for petitioner were to attempt to file a "Next Friend" petition against petitioner's wishes, then respondent would vigorously assert that such a petition would be time barred. Thus, far from attempting to

"exploit" any alleged "tension" between petitioner and counsel, respondent was being cooperative in suggesting that once petitioner and counsel agreed on a single petition that was authorized, respondent would not try to obstruct that agreement by asserting that there was a failure to comply with the limitation of actions. This is what makes counsel's attack on respondent unfair.

II.
REPLY TO PETITIONER'S "FACTS RELATING TO FILING OF PETITION AND VERIFICATION THEREOF"

Petitioner's second section of his Opposition is entitled, "Facts Relating to Filing of Petition and Verification Thereof." In that section, petitioner, backed by a declaration of counsel and two other pleadings attached as exhibits, explicates the process leading to the verifications of the petition. Opposition at 3-6.

The only two objective reasons for the inclusion of this section could be 1) to disprove that there was any attempt to perpetrate any fraud upon this Court, and/or 2) to demonstrate that petitioner consented to the petition. Since respondent has neither alleged nor believes that there was any attempt to commit any fraud, the section serves no purpose toward that end.

However, the section does not serve to prove that petitioner consented to the whole petition and, in fact, itself provides proof that petitioner only authorized claims one through fifteen and, in fact, refused to verify the other claims, sixteen through twenty-seven. See Opposition, Ex. 1, ¶¶ 3, 7. As stated above, petitioner maintains that the requirement that the petition be authorized is thereby satisfied, but respondent will demonstrate below that either petitioner must give his counsel a "blank check verification" as was done in Lucky v. Calderon, 86 F.3d 923 (9th Cir. 1996), e.g. ["Ms. Knox [habeas counsel] is fully authorized to file and pursue this

litigation or any other challenging my death judgment"], or petitioner must provide a traditional verification as was done here, only it must apply to the whole petition, not just part of it.

III.
PETITIONER MUST VERIFY THE WHOLE PETITION, NOT JUST PART OF IT

As stated above, petitioner maintains that the petition must be deemed authorized if he consents to any part of it, even though he violently objects to the filing of other parts of it. Respondent maintains that petitioner must either consent to the whole petition or must file a "blank check" authorization as in Lucky. This motion to dismiss, as such, will be determined on whether a petition must be wholly verified or whether it can be partially verified. Deutscher v. Angelone, et al., 16 F.3d 981, (9th Cir. 1991) clearly dictates that the motion be decided in respondent's favor.

Deutscher can actually be called Deustcher (IV). The bottom line of the case is that, where the Ninth Circuit had issued three previous opinions in the case, it held that the original petition had been both unauthorized and affirmatively disavowed by petitioner and that the prior proceedings had been a nullity and that the pending petition should be considered the first, not last, petition. Obviously, if the Ninth Circuit can so severely enforce the authorization requirement to nullify a case in which it has issued three prior opinions, it would feel no restraint against doing so here should the parties proceed without petitioner's express authorization.

Henry Deutscher was convicted of felony murder and sentenced to death in Nevada in 1978. After the Nevada Supreme Court affirmed his conviction and death sentence in Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979), Herbert Ahlswede, his state counsel, filed a federal habeas petition - purportedly on Deutscher's behalf -

which the district court denied. Before his appeal was heard, Deutscher changed lawyers in federal court. The Ninth Circuit affirmed the district court's denial of the petition in Ahlswede v. Wolff, 720 F.2d 1108 (9th Cir. 1983), cert. denied, Deutscher v. Wolff, 469 U.S. 873, 83 L. Ed. 2d 155, 105 S. Ct. 225 (1984). In addition, the Court held that the case could not be remanded to the district court pending completion of state proceedings initiated by new federal habeas counsel because the petition before the court did not contain any unexhausted claims. Ahlswede, 720 F.2d at 1109.

Deutscher, with the assistance of his new attorney, filed another and thus apparently second and successive habeas petition in the district court in 1987. In this petition he claimed, among other things, that Ahlswede provided ineffective representation. The district court denied this petition on its merits in Deutscher v. Whitley, 671 F. Supp. 1264 (D. Nev. 1987); 682 F. Supp. 1098 (D. Nev. 1988). On appeal, the Ninth Circuit reversed and held that Deutscher was denied effective assistance of counsel at Deutscher's state trial because Ahlswede failed to present mitigating evidence at sentencing, despite its availability, and did not challenge an unconstitutional aggravating factor. Deutscher v. Whitley, 884 F.2d 1152, 1159-63 (9th Cir. 1989). This was Deutscher I. The Court also held that the failure to raise the ineffectiveness claim in the Ahlswede petition, the first one, was not an abuse of the writ under existing law. Id. at 1155-56.

In Angelone v. Deutscher, 114 L. Ed. 2d 73, 111 S. Ct. 1678 (1991), the Supreme Court vacated Deutscher I and remanded the case in light of McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), which held that to excuse the omission of a claim from an initial habeas petition, a defendant must show either cause and prejudice, or that a fundamental miscarriage of justice

would result from the court refusing to entertain the claim.

However, on remand, the Ninth Circuit found that Deutscher had demonstrated that a fundamental miscarriage of justice would occur if his claim were not addressed and ruled that his sentence must be reversed because of his counsel's ineffectiveness. Deutscher v. Whitley, 946 F.2d 1443, 1446-47 (9th Cir. 1991). This was Deutscher II.

In Hatcher v. Deutscher, 121 L. Ed. 2d 279, 113 S. Ct. 367 (1992), the Supreme Court vacated Deutscher II and remanded the case in light of Sawyer v. Whitley, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992), which held that in order to demonstrate a fundamental miscarriage of justice under McCleskey, the petitioner must demonstrate by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have sentenced the petitioner to death.

On this second remand in Deutscher v. Whitley, 991 F.2d 605 (9th Cir. 1993) (Deutscher III), the Ninth Circuit concluded that Deutscher's sentencing, though marred by constitutional defects that more probably than not caused the jury to reach an improper sentence of death, could not be remedied because Sawyer "sharply limits this inquiry when it is raised in a subsequent petition for habeas relief." Deutscher III, 991 F.2d at 607.

In Deutscher IV, the Court commenced by stating:

> In Deutscher v. Whitley, 991 F.2d 605 (9th Cir. 1993) (Deutscher III), applying the stricter standards the Supreme Court has imposed on claims that a defendant fails to raise in an initial habeas corpus petition, we denied what we assumed to be Henry Deutscher's second petition. We never determined whether Deutscher had in fact previously filed a habeas petition. In his motion for rehearing, Deutscher

> renews his claim that because he never authorized the habeas petition filed by his original attorney, Herbert Ahlswede, his present habeas petition should be considered his first one. In response to Deutscher's motion, we remanded the case to the district court for the limited purpose of determining whether Deutscher authorized the filing of his first federal habeas petition. See, e.g., Williams v. Lockhart, 862 F.2d 155, 160 (8th Cir. 1988), cert. denied, 116 L. Ed. 2d 171, 112 S. Ct. 213 (1991). The district court determined that Deutscher had not authorized the first petition. We affirm the district court's findings and grant Deutscher's current habeas petition. Deutsher IV, at 982-83.

Obviously, this is the very result feared by respondent. A closer examination of the facts relative to authorization show not only that the instant case is worse than Deutscher but that there must be complete, not partial, consent to the petition. As the Court recognized:

> The issue is whether Deutscher authorized the original habeas petition filed by Ahlswede. If not, then his present petition should be regarded as his first petition, and McCleskey's and Sawyer's more stringent standards for claims raised initially in second or subsequent petitions would not be pertinent.
>
> It cannot fairly be said that Deutscher is raising a new claim at the eleventh hour. The record shows that early on Deutscher disavowed Ahlswede's petition and sought a remand so that Deutscher could become the petitioner and amend the petition to add in all of his claims. We twice granted Deutscher relief on other grounds without reaching this issue. When we denied the petition on the most recent remand, we once again reached a decision without ever

> considering whether Deutscher had authorized Ahlswede's petition. There is no reason why Deutscher should be sent to his death without a mitigation hearing because a claim he properly brought before the court was not acted upon. The record supports the district court's finding that Deutscher did not authorize the initial habeas petition filed by Ahlswede. We affirm that determination. Deutscher never signed or otherwise verified the petition, and it was filed in Ahlswede's name and signed by Ahlswede. The omission of Deutscher's signature does not prove that Ahlswede filed the petition without Deutscher's approval. In the absence of evidence to the contrary, the presumption is that petitioners represented by competent counsel have been fully informed of the claims raised in the petition. Williams v. Lockhart, 927 F.2d 374, 375 (8th Cir.), cert. denied, 116 L. Ed. 2d 171, 112 S. Ct. 213 (1991). Deutscher IV at 983-84; emphasis added.

As can be seen there, as here, the petitioner objected to the petition on a claim-by-claim basis. Moreover, the differences in the two cases are not significant. Any argument that the fact that Ahlswede's name, not Deutscher's, was on the first petition subsequently found to be unauthorized gave rise to that result is unavailing. Although Ahlswede filed the petition in his name, this was utilized by the Court in Deutscher IV as only one factor negating consent, not the sole and determinative factor invalidating the petition. In fact, were the latter true, neither the Ninth Circuit nor the district court would have entertained the petition and even reversed the conviction based thereupon.

Secondly, of no more merit would be an argument that when, in the opinion, the Ninth Circuit indicated that Deutscher disavowed the petition, it meant

that he disavowed the whole petition and that petitioner has not done so here. First, this brief reference in Deutscher IV does not support the factual conclusion that Deutscher disavowed the complete petition instead of that, like here, he disavowed the petition because he objected to several key parts of it.

Secondly, the interpretation of a disavowal of the whole petition in Deutscher is contradicted by the language following that portion which clearly indicates that Deutscher, like Clark, desired to have the petition meet his specifications by approving certain claims while rejecting others.

Next, even if it were factually true that Deutscher had disavowed the whole petition, this would not logically dictate that the Ninth Circuit would change its legal conclusion if confronted with a case wherein the petitioner had rejected a substantial portion of the petition. It is hard to envision the Deutscher Court approving of the filing of a petition, as here, at the time of the filing according to counsel themselves, petitioner disavowed a substantial portion of the petition although not all of it.

Lastly, since the filing of the petition, petitioner has made clear that he now disavows the entire petition. Counsel has served respondent and the Court with a document entitled, "Notice of Petitioner's Objection to Continued Representation by Appointed Counsel," in which petitioner, in fact, does not request dismissal of counsel, but does affirmatively disavow the petition filed. A copy of this pleading is included herein for the convenience of Court and counsel and attached as Exhibit A.

As the Court concluded:

> Moreover, in a declaration submitted to the district court, Ahlswede confirmed that he filed the petition without notifying Deutscher or seeking his authorization. Ahlswede mailed Deutscher a copy of the petition after filing it,

> but he never explained the nature of federal habeas corpus proceedings, the risk that claims not raised might be barred as abuse of the writ, or the appropriateness of having other counsel file the petition. The record satisfies us that the district court properly found that Deutscher did not understand the significance of federal habeas proceedings and did not authorize Ahlswede to file the federal habeas petition. Because Ahlswede filed his petition without Deutscher's signature, knowledge, or consent, we are compelled to hold that the petition Deutscher subsequently filed with the assistance of new counsel is Deutscher's initial habeas corpus petition. Deutscher IV at 984.

As can be seen, in Deutscher, the petitioner was mailed a copy of the petition. Petitioner here will attempt to argue that he, unlike Deutscher, signed the petition. However, as petitioner's own Opposition makes clear, petitioner only signed his consent to half of the petition. He expressly refuses to consent to the other half and thus refused to authorize the petition. Or, stated another way, the petition that petitioner authorized was comprised of only half of the claims. Petitioner originally reviewed multiple "drafts" of the petition and advised counsel that he would only "personally verify some of the claims for relief set out in the draft petitions." Opposition, Ex. 1, ¶ 3. As the Opposition makes clear, "On or about April 3, 1997, I sent to Petitioner another draft petition containing the [fifteen] claims for relief which he had indicated he would personally verify. . . . During the morning of April 23, I met with Petitioner at San Quentin, California. At that time, Petitioner personally verified a copy of the draft petition which had been sent to him on or about April 3, which contained the 15 claims for relief he had originally indicated he would personally verify." Opposition, Ex. 1, ¶¶ 4, 7.

Finally, since petitioner's most recent communication indicates that because the petition that was filed did not comport with petitioner's specifications he now disavows the whole petition, such an attempt to distinguish Deutscher would no longer have any factual basis.

CONCLUSION

There can be no doubt that if this authorization problem is not solved in accordance with existing law, the ensuing litigation will be invalid. This is a matter of utmost concern to respondent and is equally of concern to this Honorable Court. Moreover, petitioner does not appear to be as passive as was Deutscher in the prior litigation. Not only has counsel for petitioner filed an opposition which candidly admits that petitioner would only agree to consent to the filing of half the claims, but the petitioner is now actively asserting his opposition to and disavowal of the entire petition at this point as well. Under these circumstances, petitioner and counsel must agree on one petition or, in the alternative, counsel must procure from petitioner a "blank check authorization" as in Lucky allowing counsel to conduct the habeas proceeding as counsel see fit.

Thus, this Court should either dismiss the action as unauthorized, or, in the alternative, compel petitioner to verify the petition filed or have petitioner and counsel to, from either the petition served upon respondent or that previously verified by petitioner, create an amended petition the filing of which petitioner fully consents.

Dated: June 23, 1997

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

CAROL WENDELIN POLLACK
Senior Assistant Attorney General

KEITH H. BORJON
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Deputy Attorney General

Attorneys for Respondent

RSH:rm
LA95XW0006

APPENDIX J

Douglas Clark,
C-63,000
Tamal, CA 94974

To: Fujioka, R. Henry, and Judge Takasugi.

Douglas Clark vs. Calderon, CV-92-6567 RMT

1) due to the utter hilarity and Twilight Zone aspect of Respondent's recent REPLY, wherein he gets tangled up in sentences where "petitioner" argues with himself, when it was FUJIOKA and CLARK disagreeing, not a multiple personality having a debate with himself, we need to ORDER Mr Henry to SAY FUJIOKA when it is FUJIOKA stating something in a brief, and SAY CLARK when it is CLARK presenting a differing point of view.

Mr Henry states, on page 3, line 12: "This dispute also defines the sum and substance of petitioner's (FUJIOKA'S) second paragraph of HIS "Preliminary Statement" wherein he argues that petitioner's (CLARK'S) Motion to Correct Petitioner, which he (FUJIOKA) characterizes as "Respondent's primary 'evidence' of non-authorization, demonstrates that petitioner (CLARK) authorized the petition." It goes on, with pronouns and confusion galore. I notified RESPONDENT that I did NOT authorize FUJIOKA's MISLABELED "PETITIONER'S OPPOSITION to MOTION TO DISMISS." I did not present that pack of lies to this Court, FUJIOKA did, in a feeble effort to cover his criminal conduct.

2) It is obvious Attorney General Daniel LUNGREN is condoning and covering up for FUJIOKA's perjury, and fraud upon this Court. After filing a biting investigatory brief inquiring into the likely

fraud upon this Court and perjury by Fujioka, when Mr Lungren learned I too seek Mr Fujioka's disbarment and trial for FELONIES committed recently in this matter, suddenly he (LUNGREN) as decided to NOT EVEN ALLEGE the possibility of fraud or misconduct by the suspect. (In re Carpenter, 9 CAL 4 __, makes it clear Mr. Lungren is of a mind to immunize criminal conduct if it harms his chances to win a death penalty review.) I however do NOT feel quite so magnanimous towards the felon who has deprived me of nearly half a decade of my life, without his doing a thing to prepare this writ. I therefore challenge this Court to hold a hearing, specifically to determine if my "counsel" now is an uncharged felon who owes his freedom and bar card to Mr Lungren, for a clear and overt grant of IMMUNITY FROM PROSECUTION FOR PERJURY (Calif. Penal Code 134, and more.) It is my belief my "counsel" now must be very 'nice' to Mr Lungren, or fact utter devastation of his career, and loss of his freedom. That, if one were to look, is a textbook "CONFLICT OF INTEREST."

I should NOT be forced to accept this slipshod incompetent incomplete and extremely helpful (to the STATE) work by this man Fujioka, when the state's lawyer (LUNGREN) holds the ultimate power over whether to prosecute or immunize his criminal acts regarding this brief. Fujioka LIED, and is still trying to lie about the fact he debated the content of issues 1-15, was forced to change the content of those issues to a substantial degree, and then merely switched copies to which he attached a sworn verification signed under the version I personally demanded he file. He did not file it. That is NOT just "added issues."

The state bar is currently pondering action against Fujioka. A assume as always, the bar discipline unit will

do Mr Lungren's bidding. Mr Lungren immunizes corrupt lawyers when it is convenient to his cause, and the bar in this matter has acted directly long that same theory.

Thus, 'counsel' must be removed because of the criminal acts he committed, AND the FACT Mr Lungren has granted him some form of OFF RECORD and ILLICIT IMMUNITY. I can only assume the attorney general's generous offer to ignore the LAW which he is sworn to uphold and enforce MUST have some coercive intent which can ONLY work to my disadvantage. It is obvious Mr Lungren does not reward or encourage zealous competency from capital case counsel. Otherwise, why would his other client (The Governor) slash the State Public Defender budget in half, fire five of my lawyers at that agency, while granting Mr Lungren's agency huge budget INCREASES. The clear impression any HONEST unbiased observer is left with is that Mr Lungren is only 'generous' with grants of immunity when he expects something in return.

3) STOP FILING AND/OR ACCEPTING FILINGS by wither counsel (Fujioka and HSU) and Respondent which purport to be "PETITIONER's" filings, or RESPONSES to same, unless I personally signed and mailed the mentioned "petitioner's document myself. Fujioka's outrageous attempt to extricate himself from criminal conduct by filing a "Petitioner's Opposition. . ." is pathetic and NOT authorized.

STRIKE FUJIOKA'S self-serving nonsense listed as "Petitioner's reply to Respondent's Motion. . ." and strike as MOOT the Respondent's REPLY to it. I did not file it, it is VOID, and the RESPONDENT'S

reaction to the improperly filed document should be struck with it.

Summation. It is particularly disgusting to watch the Attorney General of the State of California do a back flip in his effort to now try to COVER UP and IMMUNIZE criminal conduct he himself helped stridently point out to this Court. Fujioka, willfully, with malice and clear intent, switched the Sworn Declaration and Verification from a brief he did NOT wish to file, to one he did wish to file, and THEN he added in the issues after #15. Suddenly Mr Lungren wishes to PRETEND not to know full well the pages and claims in issues 1-15 weren't the same, in both the filed and the verified copies. They are not, were not, and the change was made because an arrogant lawyer decided he knew best, he would REMOVE the offensive and false matters, get me to sign that version, then switch the declaration under oath onto the coy with the offensive items. Mr Lungren may wish to ignore HIS OATH to prosecute criminal activity he observes right before his eyes, (adopting Mr. Henry's trait of attributing the act of counsel for the formal state attorney listed OVER his name) but the facts remain on record. I wonder, for the record, is it proper and legal for a prosecutor to 'discretely" immunize appellate counsel's clear felonies, without formalizing that immunity and explaining for the record under oath WHY he has chosen to turn a blind eye to this obvious criminal misconduct? Is the "investigation" closed, with this sudden BACK FLIP, or is it merely put on hold, pending the good conduct by my counsel, as JUDGED by the state prosecutor?

This entire matter stinks. Both counsel's conduct STINKS of collusion, corruption, criminality and fraud. Mr Lungren's actions reek.

I filed this by mail with both counsel (Henry, Fujioka) via prison staff/mail room, this date. June 30, 1997.

I swear to the forgoing under the somewhat vague state law of perjury as dubiously enforced by the Attorney General Dan Lungren to his own ends.

DOUGLAS DANIEL CLARK
PETITIONER

APPENDIX K

DEATH PENALTY

ENTER
FILED
JULY 30, 1997
CLERK, DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
BY DEPUTY

THIS SUBSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

ENTERED
CLERK, U.S. DISTRICT COURT
JULY 31, 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK,	CV 92-6567-RMT
Petitioner,	DEATH PENALTY CASE
vs.	ORDER GRANTING REQUEST TO DISCHARGE CURRENT COUNSEL AND APPOINTING MANUEL ARAUJO AS COUNSEL FOR PETITIONER
ARTHUR CALDERON, Warden of California Prison at San Quentin,	
Respondent.	(FILED UNDER SEAL)

This matter has come before the court on the request by petitioner Douglas Clark to discharge his appointed counsel. Preliminarily, the court notes that although "there is no constitutional right to counsel on

habeas," Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993), "[t]here is, however, a right to due process." Id. This court is of the opinion that the Fifth Amendment right to due process would, in most cases, provide the same protection as that provided by the constitutional right to counsel under the Sixth Amendment.

Within that context, this court has considered the timeliness of petitioner's request, the source of petitioner's dissatisfaction and the extent of conflict between petitioner and his counsel, and finds as follows: While petitioner has not delayed in registering his complaints about his court-appointed attorneys, and it appears that an irreconcilable conflict has arisen between petitioner and his counsel posing a substantial risk of preventing adequate representation of petitioner, the source of petitioner's dissatisfaction appears to border on frivolous or manipulative grounds. Nevertheless, in light of petitioner's due process right, substitution of counsel is warranted. However, petitioner is advised that "[t]he Sixth Amendment [right to counsel and the Fifth Amendment right to due process provide[] no right to counsel [who will] blindly follow[] a defendant's instructions. Furthermore, there is no absolute right to counsel of one's choice." United States v. Robinson, 913 F.2d 712, 716 (9th Cir. 1990), quoting United States v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987).

Accordingly,

IT IS ORDERED that the request by petitioner Douglas Clark to discharge his appointed counsel is granted, and Manuel U. Araujo, Esq., 13330 Philadelphia Street,. Whittier, California 90601, is hereby appointed in their place.

IT IS FURTHER ORDERED that this Order be filed under seal.

Dated: //O.D.

//o.s.
ROBERT M. TAKASUGI
United States District Judge

APPENDIX L

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON,
Chief Assistant Attorney General
CAROL WENDELIN POLLACK,
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KEITH H. BORJON,
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Attorneys for Respondent

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS DANIEL CLARK, Petitioner v. ARTHUR CALDERON, Warden of the California State Prison at San Quentin, Respondent.	NO. CV 92-6567 RMT [DEATH PENALTY CASE] RESPONDENT'S NOTICE OF APPEAL

PLEASE TAKE NOTICE that respondent Arthur Calderon, Warden of the California State Prison at San Quentin, hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's order entered and filed on July 31, 1997, entitled, "ORDER DENYING MOTION TO DISMISS PETITION AND ALTERNATIVE MOTION TO COMPEL FULL VERIFICATION BY PETITIONER."

DATED: August 26, 1997

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON,
Chief Assistant Attorney General
CAROL WENDELIN POLLACK,
Senior Assistant Attorney General
KEITH H. BORJON, Supervising
Deputy Attorney General

ROBERT S. HENRY,
Deputy Attorney General

Attorneys for Respondent

PROOF OF SERVICE BY MAIL

I, the undersigned, certify and declare that I am a resident of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within cause; my business address is 300 S. Spring Street, Los Angeles, California 90013.

On August 26, 1997 I served a true copy(s) of

RESPONDENT'S NOTICE OF APPEAL

in Case No. CV 92-6567 RMT entitled

DOUGLAS DANIEL CLARK V. ARTHUR CALDERON,

Warden of the California State Prison at San Quentin

by depositing same in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

Manuel Araujo
Attorney at Law
13330 Philadelphia Street
Whittier, CA 90601

I further declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26TH day of August 1997, at Los Angeles, California.

/s/
Rita Murphy

LA94XW0004

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, California State Prison at San Quentin, Petitioner,	)	CAPITAL CASE
THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent,	)	
DOUGLAS DANIEL CLARK, Real Party in Interest	)	

On Review from the United States District Court
For the Central District of California
No. CV 92-6567 RMT
The Honorable ROBERT M. TAKASUGI, Judge

PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, FOR WRIT OF PROHIBITION

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
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Table of Contents

	Page
PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION	1
INTRODUCTION	8
STATEMENT OF THE ISSUE	11
STATEMENT OF FACTS	11
QUESTION PRESENTED	14
ARGUMENT	15
I. THE WARDEN HAS NO OTHER PLAIN, SPEEDY OR ADEQUATE REMEDY RATHER THAN THE EXTRAORDINARY WRITS SOUGHT HEREIN	15
II. A WRIT OF MANDAMUS AND/OR PROHIBITION CLEARLY LIES HERE	18
CONCLUSION	25

Table of Authorities

	Page
Cases	
Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486 (9th Cir. 1989)	18
Bauman v. United States Dist. Court , 557 F.2d 650 (9th Cir. 1977)	18-20, 23, 25
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	10
Coopers & Lybrand v. Livesay, 437 U.S. 463 [(1978)	15
Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991)	9, 14, 20-22
Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	16
Lucky v. Calderon, 86 F. 3d 923 (9th Cir. 1996)	8, 9, 11, 14, 20, 22, 23
Merle Norman Cosmetics, Inc. v. United States Dist. Court, 856 F.2d 98 (9th Cir. 1988)	19, 20
Oregonian Publishing Co. v. United States Dist. Court, 920 F.2d 1462 (9th Cir. 1990)	19
United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988)	19
Valenzuela-Gonzalez v. United States Dist. Court, 915 F.2d 1276 (9th Cir. 1990)	19, 20
Statutes	
28 U.S.C. § 1651	10, 18

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, California State Prison at San Quentin, Petitioner,	)	CAPITAL CASE
THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent,	)	
DOUGLAS DANIEL CLARK, Real Party in Interest	)	

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

I.

Petitioner Arthur Calderon is the Warden of the California State Prison at San Quentin and has Douglas Daniel Clark, the real party in interest, within his lawful custody and control pursuant to a valid judgment of conviction by the Superior Court of Los Angeles County, State of California, for violation, inter alia, of Penal Code 187, murder.

II.

Respondent Court is a district court of the United States District Court for the Central District of California.

III.

Real Party in Interest Douglas Daniel Clark (Inmate Clark) is an inmate at the California State Prison at San Quentin confined under six separate judgments of death for, inter alia, violation of Penal Code section 187.

IV.

On November 3, 1992, Inmate Clark filed a request for appointment of counsel and for stay of execution in Respondent Court.

V.

On April 23, 1997, a petition for writ of habeas corpus by a person in state custody was filed, purportedly on Inmate Clark's behalf, in Respondent Court.

VI.

The petition referred to in paragraph five contained a verification "of the First through Fifteenth Claims" signed by Inmate Clark and a separate verification of claims sixteen through twenty seven by appointed counsel for Inmate Clark which specifically averred therein that, "At this time, [Inmate Clark] is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief."

VII.

On May 21, 1997, The Warden filed a "Notice of Motion and Motion to Dismiss Petition as Unauthorized, or, In the Alternative, to Compel Full Verification by Petitioner," seeking to have Respondent Court either dismiss the petition or compel Inmate Clark to properly authorize it.

VIII.

On the dates of June 10, 1997 and June 30, 1997, Real Party in Interest, Inmate Clark, filed various pleadings in propria persona in Respondent Court indicating that he had verified a petition that did not contain claims sixteen through twenty seven at all, that the

page upon which he had verified the petition was unnumbered at the time he had verified it, that claims sixteen through twenty seven had been placed back into the petition after he had ordered his appointed counsel to remove them, that he had been a victim of a fraud, and that he was then disavowing the petition and demanding removal of his appointed counsel.

IX.

On June 16, 1997, appointed counsel for Inmate Clark filed a document entitled "Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," in Respondent Court.

X.

On June 23, 1997, the Warden filed in Respondent Court a document entitled "Reply to 'Opposition to Motion to dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner."

XI.

On July 30, 1997, Respondent Court issued an order entitled, "ORDER DENYING MOTION TO DISMISS PETITION AND ALTERNATIVE MOTION TO COMPEL FULL VERIFICATION BY PETITIONER," which denied the Warden's motion.

XII.

On or about August 18, 1997, the Warden filed an "Ex Parte Application for Certification of Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and Stay of Proceedings Pending Interlocutory Appeal."

XIII.

On August 27, 1997, Respondent Court filed an "ORDER DENYING *EX PARTE* APPLICATION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL."

XIV.

That Respondent Court is required, as part of its ministerial duties, to dismiss any petition that is not

authorized to be filed by the inmate and the petition filed on April 23, 1997, purportedly on Inmate Clark's behalf, referred to above in paragraph V, was not authorized by the inmate; or, Respondent Court, in the alternative, was required, as part of its ministerial duties if it chose not to dismiss the petition as unauthorized, to compel Inmate Clark to fully verify the petition before continuing legal proceedings thereupon.

XV.

That Respondent Court's Order of July 30, 1997, refusing to either dismiss the petition as unauthorized or compel Inmate Clark to fully verify it was an act in excess of Respondent Court's jurisdiction.

XVI.

Unless mandated to either dismiss the petition or compel full verification by Inmate Clark and/or restrained from proceeding with litigation on the petition, the Warden will be irreparably injured by being forced to undergo the needless expense of litigating a petition that is unauthorized and thus is null and void, after which, the Warden will then have to undergo additional litigation on any properly authorized petition subsequently filed with the result being needless loss of time and expenditure of funds. Furthermore, during this time, the Warden will be needlessly delayed, for the periods of time it would take until it is determined that the petition is unauthorized, in carrying out his lawfully imposed duty of executing a sentence of death upon the Real Party in Interest.

XVII.

The Warden has no plain, adequate, and efficacious remedy on appeal in view of the fact that the Respondent Court has denied the Warden certification of the issue for interlocutory appeal, a regular appeal would not be efficacious because the Warden will have engaged in the needless litigation and will have been delayed in carrying out his lawful duties, if he were forced to wait

until after the void petition has been litigated to challenge the Respondent Court's decision on appeal but since a regular appeal, despite its lack of utility, could be taken from the order, a "collateral order" appeal which the Warden has filed in this Court may be rejected under the theory that for a "collateral order appeal" to be pursued, the matter must be unreviewable on appeal.

XVIII.

The Warden has no lower court remedy because Respondent Court has denied his motion to dismiss the petition or compel Inmate Clark to verify it.

WHEREFORE, the Warden prays that this Court issue a writ of mandate and/or prohibition, or an Order to Show Cause requesting that Respondent Court demonstrate why such writs should not be issued, mandating Respondent Court to dismiss the Petition for Writ of Habeas Corpus purportedly filed on behalf of Inmate Clark on April 23, 1997, or, in the alternative, to compel Inmate Clark to fully verify or otherwise endorse the petition, AND/OR restraining and prohibiting Respondent Court from proceeding with litigation of the said petition for writ of habeas corpus in absence of full verification of it by Inmate Clark.

Dated:

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

CAROL WENDELIN POLLACK
Senior Assistant Attorney General

DONALD E. de NICOLA
Supervising Deputy Attorney General

ROBERT S. HENRY
Deputy Attorney General

Attorneys for PETITIONER

INTRODUCTION

This Petition for a Writ of Mandamus and/or Prohibition is brought by Arthur Calderon, Warden of the California State Prison at San Quentin (hereinafter the "Warden") and respondent in a habeas corpus action commenced by Real Party in Interest Douglas Daniel Clark (hereinafter "Inmate Clark").

On April 23, 1997, a petition for writ of habeas corpus was filed on behalf of Inmate Clark by his appointed counsel. The petition alleged, inter alia, that Inmate Clark was verifying solely the first fifteen claims of the petition and that appointed counsel believed Inmate Clark to be incapable, by reason of mental condition, defect or disposition, of verifying the remaining claims, i.e., claims sixteen through twenty seven.

In light of this allegation, on May 21, 1997, the Warden filed a motion to dismiss the petition as unauthorized or, in the alternative, to compel Inmate Clark to verify all aspects of the petition (or to simply provide a statement, such as in Lucky v. Calderon, 86 F. 3d 923 (9th Cir. 1996), that he is generally endorsing the prosecution of the suit by his appointed counsel).

On June 10, 1997, and June 30, 1997, Inmate Clark, far from rendering such an endorsement, filed pleadings indicating that claims sixteen through twenty seven had been put back into the petition after he had demanded of appointed counsel that they be removed therefrom. Those pleadings also indicated that Inmate Clark was then disavowing the whole petition and that the verification he had signed had been on an unnumbered page upon which the number had been added later. Inmate Clark demanded the removal of his then appointed counsel and claimed that he had been the victim of a fraud.

On June 16, 1997, appointed counsel for Inmate Clark filed an opposition to the motion in which they

asserted that the verification by Inmate Clark of the first fifteen claims was sufficient to authorize the petition and also asserted that the Warden was trying "to exploit the contentious relationship between [inmate Clark] and his counsel in hopes that because of the tension between [inmate Clark] and his counsel, [inmate Clark] and counsel will be unable to reach agreement on a subsequent form of Petition."

On June 23, 1997, the Warden filed a reply to the opposition indicating that his concern was that if the petition was not properly authorized, at least in the mode as was done in Lucky, the petition would be vulnerable to being deemed unauthorized as a petition was deemed to be in the case in Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991).

On July 30, 1997, Respondent Court filed an "ORDER DENYING MOTION TO DISMISS PETITION AND ALTERNATIVE MOTION TO COMPEL FULL VERIFICATION BY PETITIONER," in which it held that "petitioner's verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler."

The Warden then filed an ex parte application attempting to certify this order for interlocutory appeal. Respondent Court issued, however, an "ORDER DENYING *EX PARTE* APPLICATION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL."

The Warden brings this action to either mandate that Respondent Court dismiss the petition as unauthorized, a ministerial act respondent court is required to do when any petition is filed that is unauthorized and actively opposed by the habeas petitioner, or, in the alternative, compel the real party in interest to fully verify the petition and/or restrain respondent court from further proceedings upon the

petition in absence of full verification of it by the real party in interest.

Although the Warden has appealed the latter order, based on the "collateral order" doctrine developed in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), the Warden anticipates that this Court may find that it does not properly have jurisdiction over said appeal. If the Court so rules, the Warden's only remedy to correct the district court's error would be through this petition for mandamus and/or prohibition pursuant to 28 U.S.C. § 1651. Since this Court's standards for granting such relief are otherwise clearly satisfied, the Warden respectfully requests that the Court grant this petition and issue a writ directing the district court to dismiss the petition as unauthorized, or, in the alternative, compel the real party in interest to fully verify the petition and/or restrain respondent court from further proceedings upon the petition in absence of full verification of it by the real party in interest.

STATEMENT OF THE ISSUE

The issue herein is whether a petition for writ of habeas corpus is properly authorized, under Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991) or Lucky v. Calderon, 86 F.3d 923 (9th Cir. 1996), where an inmate verifies a petition which he believes to be whole, after which additional claims are added which are verified by counsel only, who avers that the inmate is not willing to verify the additional claims, and where the inmate then disavows the entire petition and asserts that his earlier verification had been obtained by fraud.

STATEMENT OF FACTS

Inmate Clark was convicted by a Los Angeles County jury of the first-degree murder of six women in a series of killings known as the "Sunset slayings." The jury fixed the penalty at death.

On or April 23, 1997, appointed counsel filed, purportedly on Inmate Clark's behalf, a petition for writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254 (see Appendix 1 (appendices filed concurrently herewith)), seeking to overturn his convictions and death sentences for literally dozens of different reasons.

As part of the petition, appointed counsel for Inmate Clark alleged that he had personally verified claims sixteen through twenty seven because, "At this time, [Inmate Clark] is incapable of verifying, unable to verify, or otherwise not willing to undertake the act of formally verifying the Sixteenth through Twenty Seventh Claims for Relief."

On May 21, 1997, the Warden filed a "Notice of Motion and Motion to Dismiss Petition as Unauthorized, or, in the Alternative to Compel Full Verification by Petitioner," (see Appendix 2). In his motion, the Warden contended that the petition had openly heralded the fact that it was not authorized by the inmate and that the inmate should therefore be compelled to either verify it or it should be dismissed.

Inmate Clark, then filing documents in propria persona, filed a document on June 10, 1997, in Respondent Court entitled, "Notice of Petitioner's Objection to Continued Representation by Appointed Counsel," (see Appendix 3), and another document on June 30, 1997, entitled, "Actual Opposition to Fukioja's Perjurious Documents Filed 4-23-97 and 6-16-97," (see Appendix 4).

Inmate Clark's appointed counsel, on June 16, 1997, then filed a document entitled, "Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," (see Appendix 5) arguing therein that Inmate Clark's verification of some of the claims in the petition sufficed to indicate that it was authorized.

The Warden then, on June 23, 1997, filed its "Reply to Opposition to Motion to Dismiss Petition as Unauthorized, or, in the alternative, to Compel Full Verification by Petitioner," (see Appendix 6) arguing that the state of the record, including Inmate Clark's *in propria persona* denunciations of the petition and the claims contained therein against his express wishes rendered the petition unauthorized.

On July 7, 1997, Inmate Clark, *in propria persona*, filed a letter (see Appendix 7) criticizing both his counsel and the Warden's reply.

On July 30, 1997, Respondent Court issued two orders. One order was entitled, "ORDER GRANTING REQUEST TO DISCHARGE CURRENT COUNSEL AND APPOINTING MANUEL ARAUJO AS COUNSEL FOR PETITIONER" (see Appendix 8), and the other order was entitled, "ORDER DENYING MOTION TO DISMISS PETITION AND ALTERNATIVE MOTION TO COMPEL FULL VERIFICATION BY PETITIONER," (see Appendix 9).

In the latter order, Respondent Court held that, "petitioner's verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler."

On or about August 18, 1997, the Warden filed with Respondent Court a document entitled "Ex Parte Application for Certification of Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and Stay of

Proceedings Pending Interlocutory Appeal" (see Appendix 10).

On August 27, 1997, Respondent Court issued an "ORDER DENYING *EX PARTE* APPLICATION FOR CERTIFICATION OF INTERLOCUTORY APPEAL," (see Appendix 11.) In this Order, Respondent Court refused to certify the case for interlocutory appeal thereby foreclosing this avenue of relief to the Warden.

QUESTION PRESENTED

Is a petition for writ of habeas corpus filed on behalf of a person in state custody "authorized" within the meaning of Deutscher v. Angelone and Lucky v. Calderon, where A) the inmate's counsel 1) obtained the inmate's signature on a verification page, 2) designated that verification as applying only to approximately half of the claims in the petition, and, 3) attached a separate verification by inmate counsel a) verifying the remaining claims and b) averring that the inmate was incapable or unwilling, due to mental condition, of verifying those same remaining claims, and B) the Inmate subsequently 1) accuses counsel of adding back to the petition claims that the inmate had expressly removed from the petition, and 2) then files a pleading disavowing the whole petition?

ARGUMENT

I.

THE WARDEN HAS NO OTHER PLAIN, SPEEDY OR ADEQUATE REMEDY RATHER THAN THE EXTRAORDINARY WRITS SOUGHT HEREIN

The Warden has no other plainly adequate remedy than this extraordinary writ. The three possible avenues of appeal are 1) interlocutory appeal, 2) regular appeal, and 3) collateral order appeal.

Respondent attempted to have Respondent Court's Order certified for interlocutory appeal but Respondent Court refused to certify it. See Appendices 8 and 9.

As explained above, a regular appeal would be inadequate to protect the Warden because he will have undergone the needless expense of invalid litigation by the time the issue of authorization can be adjudicated in the course of a regular appeal.

Lastly, appeal of the Order as a "Collateral Order" is being pursued by the Warden contemporaneously with the filing of these extraordinary writs. However, under that doctrine:

> First, the order must "conclusively determine the disputed question." Coopers & Lybrand v. Livesay, 437 U.S. [463,] 468 [(1978)]. Second, the order must "resolve an important issue completely separate from the merits of the action." Ibid. Third and finally, the order must be "effectively unreviewable on appeal from a final judgment." Ibid. (footnote omitted).

Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988).

Here, the Warden can easily satisfy the first two criteria. First, the Order here conclusively determines that the petition is authorized. Secondly, the authorization question is an important issue that is completely separate from whether the petition has any merits.

However, there may be a question of whether the issue would be legally unreviewable on appeal. The Warden must certainly admit that the authorization question would exist, for practical purposes, following normal appeal. The problem is, however, who would advance the issue on appeal if litigation proceeds to judgment on the merits of the petition.

Certainly, it would not benefit the Warden to resurrect the issue if he has been successful in obtaining a denial of the writ. Upon that same occurrence, a denial of the writ, it would be disingenuous of Inmate Clark's counsel to then switch from the position they took to prevail below on the Warden's motion to dismiss and then assert that the petition had really been unauthorized "all along."

On the other hand, should the writ be granted, the Warden would have little extra incentive to challenge the status of the petition as unauthorized because the basis of the grant of the writ would likely have little to do with the authorization status of the petition and the same reasons for granting the writ would likely exist in any future litigation on a truly authorized petition. Thus, the most effacious course of action for the Warden would be to challenge the grant of the writ on appeal rather than to challenge the status of the petition as unauthorized. Having already expended the resources fighting the unauthorized petition, the natural tendency would be to direct the Warden's efforts into overturning the grant of the writ on its merits on appeal rather than attempting to relitigate the authorization question. Lastly, obviously, if

the writ is granted, Inmate Clark's counsel would have no logical reason to contest the authorization status of the petition.

This inquiry reveals that any post-judgment attacks on the authorized status of the petition are likely to come from Inmate Clark himself in a proceeding other than on direct appeal. Unfortunately, denial of relief at this point would leave Inmate Clark in a win-win situation. Inmate Clark could simply await the results of the litigation of the writ on its merits, challenging the authorization status only if he lost. This being true, the Order is, for all practical purposes, completely unreviewable on appeal. However, since technically, the authorization question may be raised on appeal, the Warden has no assurance that such a technicality might invalidate its attempt to appeal the order as a "Collateral Order."

II.

A WRIT OF MANDAMUS AND/OR PROHIBITION CLEARLY LIES HERE

In Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977), this Court identified five factors to be considered in determining whether to grant mandamus relief pursuant to 28 U.S.C. § 1651:

> 1. Whether the party seeking mandamus "has no other adequate means, such as a direct appeal, to attain the relief . . . desire[d]";
>
> 2. Whether the petitioner "will be damaged or prejudiced in a way not correctable on appeal";
>
> 3. Whether "[t]he district court's order is clearly erroneous as a matter of law";
>
> 4. Whether "[t]he district court's order is an oft-repeated error or manifests a persistent disregard of federal rules"; and
>
> 5. Whether "[t]he district court's order raises new and important problems, or issues of law of first impression."

Bauman, 557 F.2d at 654-55.

These five factors serve as the departure point for analysis of the propriety of mandamus relief. Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1491 (9th Cir. 1989). "Satisfaction of all five factors is not required." Ibid. As Bauman recognized, "rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." Bauman, 557 F.2d at 655. In fact, the fourth and fifth factors will rarely be present together. United States v. United States Dist. Court, 858 F.2d 534, 537 (9th Cir. 1988).

In general, as this Court said in Bauman, "[t]he considerations are cumulative and proper disposition will

often require a balancing of conflicting indicators." Bauman, 557 F.2d at 655; see also Oregonian Publishing Co. v. United States Dist. Court, 920 F.2d 1462, 1464 (9th Cir. 1990), cert. denied, 501 U.S. 1210 (1991). While "no single factor is determinative" (Valenzuela-Gonzalez v. United States Dist. Court, 915 F.2d 1276, 1279 (9th Cir. 1990)), clear error in the district court's order may be "highly significant." Merle Norman Cosmetics, Inc. v. United States Dist. Court, 856 F.2d 98, 100 (9th Cir. 1988).

As explained more fully below, the second, third, and fifth factors are plainly satisfied here. If this Court concludes that it lacks jurisdiction of the "Collateral Order" appeal filed previously in this Court, the first factor would be present as well. Taken together, the five Bauman factors weigh heavily on the side of granting the requested writ of mandamus.

As shown above, the Order is, for all practical purposes, completely unreviewable on appeal. Thus, the first factor is satisfied. More importantly, however, for the same reasons, the Warden will be "damaged in a way not correctable on appeal" if he is forced to delay the execution of the sentence and undergo years of invalid litigation only to have Inmate Clark later challenge the petition as unauthorized. No appeal could remedy the lost time, expense, and delay in the execution of the sentence. Thus, the second factor is clearly satisfied.

The third Bauman factor goes to the merits of the petition-- i.e., whether the challenged interlocutory order is clearly erroneous. Bauman, 557 F.2d at 655. Although no one factor is determinative (see Valenzuela-Gonzalez, 915 F.2d at 1279), the existence of clear error in the order will often be highly significant. E.g., Merle Norman Cosmetics, 856 F.2d at 100. As explained more fully below, the instant order is clearly erroneous.

Clearly, the two definitive cases on the authorization question are Deutscher and Lucky. By way

of example, they both plainly indicate that the petition here is unauthorized. In fact, in Deutscher, unlike here, there was no outright disavowal of the petition. There, the Ninth Circuit demonstrated that the client "never signed or otherwise verified the petition, and it was filed in [the lawyer]'s name and signed by [the lawyer]." Deutscher, 16 F.3d at 984. Real Party in Interest may be quick to seize on these facts as distinguishing Deutscher from the instant case on the ground that, unlike there, here, Inmate Clark did verify half of the claims in the petition.

However, such an argument would be unavailing for two reasons. First, it is increasingly obvious that when Inmate Clark verified the claims he did, he was under the impression that these were the only claims that would be placed in the petition. As such, this was not a case wherein the client favored only certain claims with his authorization and took no position on the remaining claims. Here Inmate Clark thought he was verifying a whole petition and, like in Deutscher, had no knowledge that the claims he was not verifying were going to appear in the petition at all.

Secondly, now Inmate Clark is specifically disavowing the whole petition in light of his discovery of its supplementation (or addition back) of the additional claims that he had ordered removed from the petition. This fact brings this case into a mirror reverse image of Deutscher, wherein this Court observed, from the history there that:

> It cannot fairly be said that Deutscher is raising a new claim at the eleventh hour. The record shows that early on Deutscher disavowed Ahlswede's petition and sought a remand so that Deutscher could become the petitioner and amend the petition to add in all of his claims. We twice granted Deutscher relief on other grounds without reaching this issue. When we

> denied the petition on the most recent remand, we once again reached a decision without ever considering whether Deutscher had authorized Ahlswede's petition. There is no reason why Deutscher should be sent to his death without a mitigation hearing because a claim he properly brought before the court was not acted upon. The record supports the district court's finding that Deutscher did not authorize the initial habeas petition filed by Ahlswede. Deutscher, 16 F.3d at 983-84; emphasis added.

As can be seen, Deutshcer disavowed the petition and attempted to have it remanded so he could add his claims to it. With such a historical background of the case, this Court ruled that the petition was unauthorized and that the presumption in favor of authorization had been overcome. This being true, a fortiori, this result must be the same where here Inmate Clark is disavowing the petition because other claims, of which he opposes so greatly as to disavow the whole petition, are added by his counsel later.

Lucky merely stands for the proposition that despite disagreement between counsel and client, and where the presumption favoring authorization has been overcome, a client may nevertheless provide a simple statement that his counsel has authority to pursue the habeas action in his behalf. Not only did the Warden "leave the door open" for Inmate Clark and his counsel to choose this alternative when the Warden filed the motion to dismiss, but he, by virtue of the motion itself which, in the alternative, called for Respondent Court to compel Inmate Clark to fully verify the petition, invited Respondent Court and Inmate Clark to adopt this solution.

The actions of Respondent Court in refusing either to compel Inmate Clark to either 1) verify the whole petition or 2) provide a blanket authorization

statement, as in Lucky, coupled with its finding that the petition was authorized despite its own wording, which states that Inmate Clark was unwilling to verify a substantial portion of it and, in light of Inmate Clark's subsequent pleadings specifically disavowing the petition, are thus clear error.

The fourth Bauman factor involves the question of whether "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules." Bauman, 557 F.2d at 655. The Warden concedes that this factor is not present here.

The fifth and final Bauman factor pertains to whether "[t]he district court's order raises new and important problems, or issues of law of first impression." Bauman, 557 F.2d at 655. Here, the Order of Respondent Court raises important concerns and law of first impression, particularly in the context of death penalty litigation involving a petition for writ of habeas corpus by a person in state custody.

The key interplay is between the relationship of the fact that the action is essentially a civil one, commenced only by the initiation of the client, and the fact that the counsel is appointed to save the client from penal sanctions. The question is who has the authority to make the final decisions as to the make-up of the petition, the document that embodies all of the claims, and, as such, the essence of the action.

There is no question that federal law does not force an attorney on one seeking federal habeas relief. He has a statutory right to the appointment of counsel but need not avail himself of that right. No one would contest the fact that a death row inmate would have the right to file his own habeas corpus petition without seeking appointment of counsel. The question that suggests itself in light of this fact is whether, having requested counsel, the federal habeas court can force him to accept whatever

course of litigation that is chosen by his counsel, even if it is against his own wishes.

Here, Respondent Court clearly erred in dictating the course of the inmate's litigation. It did so by ruling that as long as the inmate's counsel includes material in the petition of which the inmate approves, the choice as to whatever else comprises the rest of the petition is solely that of counsel and petitioner's objections and disavowal of the petition are of no force and effect.

Clearly, this is a novel and important issue that should be resolved by this Court. No statistics need be cited for the proposition that as more of these death cases work their way into the federal habeas system, the more the federal courts are likely to see state prisoners who will be demanding a greater role, if not total control, of their own capital litigation. A resolution of the dispute here will lead to helpful guidelines for those cases.

CONCLUSION

As set forth in the foregoing analysis, application and balancing of the Bauman factors in this case compels the conclusion that mandamus relief is appropriate here. The first, second, third, and fifth factors are all present. The Warden therefore respectfully requests that Respondent Court be ordered to either dismiss the petition filed on behalf of the real party in interest or, in the alternative, that Respondent Court be ordered to compel Inmate Clark, either to verify the whole petition or authorize his counsel to proceed as counsel sees fit, OR that this Court RESTRAIN Respondent Court from litigating the petition UNLESS OR UNTIL it compels Inmate Clark to either verify the petition or authorize his counsel to prosecute the action as counsel sees fit.

Dated: August 15, 1997

Respectfully submitted,

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APPENDIX N

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	)	No. 97-99022
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	)	No. 97-71020 DEATH PENALTY

MOTION TO CONSOLIDATE APPELLATE CASES

The Warden, Arthur Calderon, "Respondent-Appellant" in Clark v. Calderon, No. 97-99022 (USDC (Central District) case No. CV 92-6567 RMT), a "collateral order" appeal of a ruling by the district court, and the "Petitioner" in a petition for writ of mandamus

and/or prohibition concerning the same order, Calderon v. United States District Court, No. 97-71020, HEREBY MOVES TO CONSOLIDATE THESE ACTIONS.

The Order of the district court which is here under appeal and also is the subject of the mandamus/prohibition action holds that the petition for writ of habeas corpus filed on behalf of petitioner Douglas Clark is not unauthorized by him. As such, these cases are not only related, but are identical because both cases seek to overturn the same district court order.

This motion is made on the ground that consolidation of the actions will promote judicial economy.

Dated: September 25, 1997.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I, the undersigned, certify and declare that I am a resident of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within cause; my business address is 300 S. Spring Street, Los Angeles, California 90013.

On Sep 26 1997 I served a true copy(s) of

MOTION TO CONSOLIDATE APPELLATE CASES (FRAP RULE 3)

in Case No. CV 92-6567 RMT entitled

DOUGLAS DANIEL CLARK V. ARTHUR CALDERON, WARDEN OF THE CALIFONRIA STATE PRISON AT SAN QUENTIN; ARTHUR CALDERON, WARDEN, ETC., V. UNITED STATES DISTRICT COURT, RESPONDENT AND DOUGLAS DANIEL CLARK

by depositing same in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

Real Party In Interest, DOUGLAS DANIEL CLARK,
c/o Manuel Araujo
Attorney at Law
13330 Philadelphia Street
Whittier, CA 90601

RESPONDENT COURT
ROBERT M. TAKASUGI, JUDGE
c/o Honorable
Leonard Brosnan, Clerk
U.S. District Court
312 N. Spring Street
Los Angeles, CA 90012

I further declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEP 26 1997, at Los Angeles, California.

F.MITCHELL

RSH:rm
LA94XW0004

APPENDIX O

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	No. 97-99022 D.C. No. CV-92-6567-RMT
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	No. 97-71020 D.C. No. CV-92-6567-RMT ORDER

Before: HUG, Chief Judge, SCHROEDER and REINHARDT, Circuit Judges.

The motion to consolidate appellate cases is

GRANTED.

APPENDIX P

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	No. 97-99022 D.C. No. CV-92-6567-RMT
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	No. 97-71020 D.C. No. CV-92-6567-RMT ORDER

Before: HUG, Chief Judge, SCHROEDER and REINHARDT, Circuit Judges.

The Petitioner's Application for Stay of the District Court Proceedings is DENIED. The petition for writ of mandamus and/or prohibition is also DENIED.

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	No. 97-99022
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	No. 97-71020 DEATH PENALTY CONSOLIDATED CASES

On Appeal from the United States District Court
for the Central District of California
No. CV 92-6567-RMT
The Honorable Robert M. Takasugi, Judge

PETITION FOR REHEARING (FRAP 40)

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Table of Contents

	Page
PETITION FOR REHEARING (FRAP RULE 40)	1
INTRODUCTION	2
A. Factual Background	2
B. Basis for Relief	5
ARGUMENT	6
I. AS THIS IS A DEATH PENALTY CASE, CIRCUIT RULE 22-6(b) MANDATES THAT THE COURT ISSUE A BRIEFING SCHEDULE, AND THEREFORE THE OPINION ERRONEOUSLY RELIES ON A MISAPPREHENSION OF FACT	6
II. IF THIS COURT DID NOT OVERLOOK THE FACT THAT THIS IS A DEATH PENALTY CASE AND HAS DEEMED THE BRIEFING TO BE INADEQUATE, THEN THIS COURT HAS MISAPPREHENDED THE LAW IN THAT IT HAS TRUNCATED THE WARDEN'S RIGHT TO AN ADEQUATE APPEAL	11

III. IF THIS COURT DENIED OR DISMISSED THE APPEAL ON THE MERITS, THEN THAT REASON SHOULD BE INCLUDED WITHIN THE ORDER 13

CONCLUSION 15

Table of Authorities

	Page
Cases	
Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971)	8
Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993)	7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	11
Dixon v. Jacobs, 138 U.S. App. D.C. 319, 427 F.2d 589 (D.C. Cir. 1970)	8
Duhart v. Carlson, 469 F.2d 471 (10th Cir. 1972)	8
N/S Corp. v. Liberty Mutual Insurance Co., 127 F.3d 1145 (9th Cir. 1997)	13
Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510 (10th Cir. 1976)	8
Statutes	
28 U.S.C. § 1254(1)	14
28 U.S.C. § 1291	11

Court Rules

9th Cir. R. 22	7
9th Cir. R. 22-6	7, 9
9th Cir. R. 22-6(b)	6, 9, 12
Fed. R. App. P. 28(a)	12
Fed. R. App. P. 31	9
Fed. R. App. P. 40	6

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS DANIEL CLARK, Petitioner-Appellee, vs. ARTHUR CALDERON, Warden of California Prison at San Quentin, Respondent-Appellant.	No. 97-99022
ARTHUR CALDERON, Warden, etc., Petitioner, v. UNITED STATES DISTRICT COURT, Respondent, and DOUGLAS DANIEL CLARK, Real Party In Interest.	No. 97-71020 DEATH PENALTY CONSOLIDATED CASES

PETITION FOR REHEARING (FRAP RULE 40)

Pursuant to Federal Rules of Appellate Procedure (hereinafter "FRAP") Rule 40, respondent-appellant hereby files this petition for rehearing of this Court's Order of January 22, 1998, denying and dismissing respondent-appellant's collateral order appeal in this case.

INTRODUCTION

In counsel's judgment, either a material point of fact or a material point of law has been overlooked by the Court in the issuance of its Order.

A. Factual Background

The Warden, Arthur Calderon, appears as "Respondent-Appellant" in a "collateral order" appeal of a ruling by the district court in Clark v. Calderon, No. 97-99022 (USDC (Central District) case No. CV 92-6567 RMT) and was the "Petitioner" in a petition for writ of mandamus and/or prohibition concerning the same order, Calderon v. United States District Court, No. 97-71020. For convenience, this pleading will refer to respondent-appellant as the Warden.

On September 17, 1997, this Court sent the Warden's counsel a form letter indicating that:

THE PROCESS OF THIS APPEAL THROUGH THE COURT IS GOVERNED

> BY CIRCUIT RULE 22-1, HABEAS CORPUS DEATH PENALTY CASES. YOU WILL BE CONTACTED BY PHONE REGARDING THE REPORTER'S TRANSCRIPT FILING DATE AND THE TIME FOR FILING THE APPEAL BRIEFS. Emphasis added.

The letter enclosed the entire circuit rule 22, including circuit rule 22-6(b). The Warden has attached the entire communiqué as Appendix 1, hereto. However, the Warden's Counsel never received a phone call from this Court advising counsel of any briefing schedule or any other matter. Attached hereto as Appendix 2 is the Declaration of Robert S. Henry so attesting.

On September 17, 1997, pursuant to FRAP rules 10(b)(3) and 12(b) respectively, the Warden filed a statement of issues and a representation statement in the collateral order appeal case, which under the rules must be filed within ten (10) days of the filing of the notice of appeal.

On November 12, 1997, this Court issued an order of denying the petition for writ of mandate/prohibition. The Order in question read:

> The Petitioner's Application for Stay of the District Court Proceedings is DENIED. The petition for writ of mandamus and/or prohibition is also DENIED.

On or about November 20, 1997, the Warden filed a "Motion for Clarification of Status of Collateral Order Appeal, or, in the alternative, Request for Issuance of Briefing Schedule." In the latter pleading, the Warden sought clarification of the continued vitality of the "collateral order appeal" since this Court had denied the petition for writ of mandate. In the alternative, however, the Warden clearly asked this Court to issue a briefing schedule pursuant to Circuit Rule 22-6, which provides in relevant part:

> ***(b) Time Schedule Order.*** *The panel shall set due dates for the preparation and transmittal of*

the record and briefing by the parties. At the direction of the panel, the clerk will issue a Time Schedule Order setting forth this schedule.

On January 22, 1998, this Court issued an order stating:

> The State's appeal based on the district court's collateral order is denied. The State submitted only a statement of issues and representation statement. This fails to comply with FRAP 28(a). We therefore dismiss the appeal. N/S Corp. v. Liberty Mutual Insurance Co., 127 F.3d 1145 (9th Cir. 1997).

The State, i.e., the Warden, however, never filed a brief at all since the Court never issued a briefing schedule under Circuit Rule 22-6 and never contacted counsel by phone to advise of any briefing schedule. The statement of issues and the representation statement, which were required to be filed as an adjunct to the creation of the record on appeal, were never intended to

constitute either parts or the whole of the briefing process.

B. Basis for Relief

This petition for rehearing seeks to advise this Court that either: (1) there has been a material misapprehension of fact, in that this is a DEATH PENALTY CAUSE, and thus under Circuit Rule 22-6(b), this Court was obliged to issue a briefing schedule, which it has not done, and therefore this Court's Order of January 22, 1998, was erroneous and should be withdrawn and a briefing schedule issued pursuant to Circuit Rule 22-6(b); or, (2) this Court, by not following its own rules and not allowing the Warden to brief the collateral order appeal, has deprived the Warden and the State of an adequate appeal, and therefore, similarly, this Court's Order of January 22, 1998, was erroneous and should be withdrawn and a briefing schedule issued pursuant to Circuit Rule 22-6(b).

ARGUMENT

I.

AS THIS IS A DEATH PENALTY CASE, CIRCUIT RULE 22-6(b) MANDATES THAT THE COURT ISSUE A BRIEFING SCHEDULE, AND THEREFORE THE OPINION ERRONEOUSLY RELIES ON A MISAPPREHENSION OF FACT

Under FRAP Rule 40, a petition for rehearing properly lies when there has been, in the decision, a misapprehension or an overlooking of fact. The Warden believes that this Court may have overlooked the fact that this is a death penalty case in which a briefing schedule is required, thereby leading this Court to erroneously dismiss the appeal on the grounds of failure to file an adequate opening brief. This being true, this Court should grant the petition for rehearing, and afterwards, vacate its previous order and issue a briefing schedule.

Here, this Court's Order of January 22, 1998, stated that, "The State submitted only a statement of

issues and representation statement. This fails to comply with FRAP 28(a)." However, Circuit Rule 22-6(b) clearly states that, "***(b) Time Schedule Order.*** *The panel shall set due dates for the preparation and transmittal of the record and briefing by the parties. At the direction of the panel, the clerk will issue a Time Schedule Order setting forth this schedule.*"

This Court has created Circuit Rule 22 to govern all death penalty cases arising from actions in habeas corpus. Clark v. Lewis, 1 F.3d 814, 816 (9th Cir. 1993) [We have adopted rules for state habeas corpus death penalty cases. See generally 9th Cir. R. 22]. Circuit Rule 22-6 is entitled, "Rules Applicable to All Death Penalty Cases." Thus, there can be no question that this Court was required to issue a time schedule order for briefing and that the Warden could not have been expected to conclude that he was required to file a brief in the absence of such an order.

Indeed, as shown by Appendix 1, attached hereto, the Warden's counsel was advised that the case would be governed by Circuit Rule 22, including Rule 22-6(b), a copy of which was sent to counsel. In fact, that same communiqué indicated this Court would contact counsel by phone and advise of a briefing schedule. As shown by Appendix 2, the Warden's counsel was never so contacted.

An early entry in the docket sheet[1] in this case clearly indicates that:

9/17/97 D O C K E T E D
C A U S E A N D
E N T E R E D
A P P E A R A N C E S

---

1. The Warden hereby requests that this Court take judicial notice of its own docket sheet in this case. A court may take judicial notice of its own records, especially in the same case. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 521 (10th Cir. 1976); Duhart v. Carlson, 469 F.2d 471 (10th Cir. 1972), cert. denied, 410 U.S. 958, 93 S. Ct.1431, 35 L. Ed. 2d 692 (1973); Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971); Dixon v. Jacobs, 138 U.S. App. D.C. 319, 427 F.2d 589 (D.C. Cir. 1970); 9 Wigmore, Evidence, Section 2579 (3rd ed.); McCormick on Evidence (2d ed.) Section 330.

OF COUNSEL.

A P P E A L

ASSIGNED TO A

SPECIAL DEATH

PENALTY PANEL.

(eu) [97-99022]

Furthermore, this Court recently, in Wharton v. Calderon, Nos. 96-99021 and 96-99023, two consolidated cases remarkably similar to the instant one wherein the Warden there also filed a collateral order appeal and a petition for writ of mandate challenging the same district court order, issued a briefing schedule which is attached hereto as Appendix 3. The Warden asks that this Court take judicial notice of its own records as attached hereto.

The clerk dutifully followed circuit rule 22-6 in assigning this case to a death penalty panel. However, as the docket sheet reveals, no briefing schedule was ever issued by this Court. This being true, if this Court dismissed this appeal on the basis of inadequacy of the

briefing, then the dismissal and denial was erroneous and based on a misapprehension of fact- i.e., that this was not a death penalty matter and that by failing to brief the case, the Warden's briefing was inadequate.

The allusion by the Order to the Warden's submission of a representation statement and a statement of issues is surely not to be taken as a statement by this Honorable Court that the Warden attempted to satisfy its briefing obligation by filing these two documents. First, the Order itself clearly indicates that no brief had ever been filed when it utilized the word "only" in the sentence that the state submitted "only a statement of issues and representation statement." Moreover, even if Circuit Rule 22-6(b) did not exist, the regular briefing schedule contained in FRAP Rule 31 provides that the earliest deadline for an appellant's brief is forty (40) days. As stated above, these two documents must be filed within ten (10) days of the filing of the notice of appeal. As

such, there is no basis for deeming these two documents to comprise an opening brief.

II.

IF THIS COURT DID NOT OVERLOOK THE FACT THAT THIS IS A DEATH PENALTY CASE AND HAS DEEMED THE BRIEFING TO BE INADEQUATE, THEN THIS COURT HAS MISAPPREHENDED THE LAW IN THAT IT HAS TRUNCATED THE WARDEN'S RIGHT TO AN ADEQUATE APPEAL

If, on the other hand, this Court is aware that this is a death penalty case, then it seems to have acted contrary to its own circuit rules. This being true, the Warden and the State, receiving no notice or any opportunity to be heard when this Court chose to act contrary to its own circuit rules, has been effectively deprived of full access to the appellate process.

First, as the Order of this Court acknowledges, 1) there was an appeal and 2) the district court's order was collateral. The Order stated that, "The State's appeal based on the district court's collateral order is denied." As such, the Court had jurisdiction over Warden Calderon's

No. 97-2024

Supreme Court, U.S.
FILED
AUG 14 1998
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* (SUPREME COURT RULES, RULE 39)

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Counsel for RESPONDENT

16 pp

COMES NOW Respondent DOUGLAS DANIEL CLARK in the above-entitled matter and presents this motion for leave to proceed *in forma pauperis*. This motion is based on Supreme Court Rules, Rule 39, and is based on the following facts.

Respondent is an indigent death row inmate at the California State Prison at San Quentin, California. On February 7, 1994Respondent was appointed counsel by the Honorable United States District Court Judge Robert M. Takasugi. Said appointment of counsel was made pursuant to Local Rule 26.8.4 of the United States District Court, Central District, California. Leave to proceed *in forma pauperis* has not been sought by Respondent in any other court. As Respondent was appointed counsel pursuant to federal statute, no affidavit or declaration accompanying this motion is required.

For the foregoing reasons, Respondent DOUGLAS DANIEL CLARK respectfully requests that this court grant his motion for leave to proceed *in forma pauperis*.

DATED: August ___, 1998.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHAEL S. MAGNUSON, Attorney for
DOUGLAS DANIEL CLARK

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
DOUGLAS DANIEL CLARK

No. 97-2024

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court's order denying a motion to dismiss a habeas corpus petition as unauthorized is immediately appealable pursuant to the "collateral order" exception to 28 USC § 1291.

2. Whether it is within the district court's sound discretion to address the merits of an unauthorized habeas corpus petition.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent DOUGLAS DANIEL CLARK respectfully submits this brief in opposition to the Petitioner for Writ of Certiorari to the Court of Appeals for the Ninth Circuit filed herein by Petitioner Arthur Calderon, Warden of the California State Prison at San Quentin.

STATEMENT OF THE CASE

Respondent DOUGLAS DANIEL CLARK is a death-row inmate in custody at the California State Prison, San Quentin. Following his conviction in 1983, the California Supreme Court affirmed the judgment and penalty in 1992. Thereafter, Respondent sought habeas corpus relief in federal court. He requested and received appointed counsel by order of United States District Court Judge Robert M. Takasugi. On April 23, 1997, Respondent filed his Petition for Writ of Habeas Corpus which contains twenty-seven separate claims for relief.

Respondent has never disavowed his intention and desire to pursue habeas relief. However, the relationship between Respondent and his appointed counsel was, at best, strained. This resulted in Respondent personally verifying the first fifteen claims of his petition while his appointed counsel verified the remaining claims.

Petitioner therefore filed a motion to dismiss the habeas petition as unauthorized, or, in the alternative, to compel full verification. Respondent's appointed counsel filed a detailed opposition thereto. The specific circumstances of the disagreements between Respondent and his appointed counsel regarding the verification of his claims were set forth in detail by appointed counsel in the opposition. Thus, the district court fully addressed the facts surrounding this issue when it considered the motion to dismiss. By this time, the relationship between Respondent and his appointed counsel deteriorated to the point where Respondent filed a notice of objection to continued

representation by appointed counsel as well as an "Opposition" to the appointed counsel's opposition to the motion to dismiss.

On July 30, 1997, the district court issued two orders. The first granted Respondent's request to discharge counsel, and present counsel was appointed. The second denied Petitioner's motion to dismiss or, in the alternative, to compel full verification. The district court's order stated that "[Respondent's] verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler."

On August 27, 1997, Petitioner filed a "collateral order" notice of appeal challenging the district court's ruling. On March 6, 1998, the Ninth Circuit Court of Appeals issued its order, stating, in pertinent part: "The state's collateral order appeal is DISMISSED pursuant to *Cohen v. Beneficial Loan Corp.*, *337 U.S. 541, 546-47 (1949)*. We hold that briefs are not necessary to our decision." The certiorari petition then followed.

SUMMARY OF REASONS FOR DENYING THE WRIT

The district court's order is not immediately appealable as a "collateral order" exception to *28 USC § 1291*. Petitioner has not and cannot demonstrate a recognized protected interest or asserted right that will be deprived absent immediate appeal. Furthermore, the district court's order does not resolve an important issue completely separate from the merits of the action; rather, the determination of which claims in Respondent's habeas corpus petition will be litigated, if any, is part and parcel of habeas action itself.

Irrespective of the appealability issue, the district court did not abuse its discretion in addressing the merits of Respondent's habeas corpus petition. It is well established that the district court can reach the merits of an unverified petition; the defect is one that the district court may, if

it sees fit, disregard. Based upon careful review of the voluminous record before it, the district court clearly did not err in accepting the petition.

ARGUMENT

I

AN ORDER DETERMINING WHETHER A STATE PRISONER HAS COMPLIED WITH 28 U.S.C. § 2242 WITH RESPECT TO VERIFYING HIS PETITION FOR WRIT OF HABEAS CORPUS IS NOT IMMEDIATELY APPEALABLE PURSUANT TO THE COLLATERAL ORDER EXCEPTION TO 28 U.S.C. § 1291.

A. The requirements of *Cohen v. Beneficial Industrial Loan Corporation* and its progeny are not satisfied.

Petitioner's primary argument is that the district court's order denying its motion to dismiss the habeas corpus petition as unauthorized is immediately appealable under *28 U.S.C. § 1291* by virtue of the so called "collateral order" exception first enunciated in *Cohen v. Beneficial Industrial Loan Corporation ,337 U.S. 541 (1949)*. Whether an order falls within the "collateral order" exception is an issue this court has revisited on many occasions. In *Gulfstream Aerospace Corporation v. Mayacamas Corporation 485 U.S. 271 (1988)*, this court succinctly summarized the law in this regard:

> "Petitioner's principal contention in this case is that the district court's order denying the motion to stay or dismiss the federal court litigation is immediately appealable under § 1291. That section provides for appellate review of 'final decisions' of the district courts. This court has long stated that as a general rule a district court's decision is appealable under this section only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but

> execute the judgment.' *Gulfstream Aerospace Corporation v. Mayacamas Corporation 485 U.S. 271 (1988)*, *Catlin v. United States 324 U.S. 229, 233 (1945)* . . . in *Cohen v. Beneficial Industrial Loan Corporation 337 U.S. 541 (1949)*, however, we recognized a 'small class' of decisions that are appealable under § 1291 even though they do not terminate the underlying litigation. *Id. at 546*. We stated in *Cohen* that a district court's decision is appealable under § 1291 if it 'finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' The petitioner asserts that the district court's decision in this case falls within *Cohen's* 'collateral order' doctrine."
>
> "Since *Cohen*, we have had many occasions to revisit and refine the collateral order exception to the final judgment rule. We have articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable under § 1291. See *Coopers & Lybrand v. Livesay 437 U.S. 463 (1978) (other citations omitted)*. First, the order must 'conclusively determine the disputed question.' *Coopers & Lybrand v. Livesay 437 U.S. at 468*. Second, the order must 'resolve an important issue completely separate from the merits of the action.' *Ibid.* Third, and finally, the order must be 'effectively unreviewable on appeal from a final judgment.' *Ibid.* If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291." *Gulfstream Aerospace Corporation v. Mayacamas Corporation, 485 U.S. at 275-276 (emphasis added)*.

The district court's order here is not a "final decision" that "ends the litigation on the merits" for purposes of § 1291 review. In fact, the exact opposite is true; the order maintains this case in litigation at the district court level. Thus, this case is directly on point with *Gulfstream Aerospace Corporation v. Mayacamas Corporation, supra*, wherein the court stated: "The order in this case has no such effect: indeed, the order ensures that litigation will continue in the District Court." *485 U.S. at 275*. Thus, Petitioner can only prevail if it is shown that the order at issue here is one of the "small class" of decisions that are appealable under § 1291 even though they do not terminate the

underlying litigation. Respondent respectfully contends that the order does not fall within that class as it does not satisfy any of the requirements mandated by *Cohen* and its progeny.

First, following the language of *Cohen* itself, it cannot be seriously argued that the State's interest in not being subjected to unauthorized habeas proceedings is a "claim of right" within the meaning of the *Cohen* holding. Petitioner's claim that such a right of the State is merely the "flip side" of the Constitutionally protected double jeopardy rights afforded criminal defendants is a leap that is not and cannot be supported by any controlling authority. The States simply are not entitled to the same protections our Constitution guarantees to individuals.

Thus, Petitioner's claim that "it is the very delay in the execution of the State's laws which can be likened to forcing a defendant to undergo repeated trials and awaiting appeal for vindication" is simply not the same type of "claim of right" that *Cohen* contemplated. It is for this reason that the cases applying the *Cohen* exception, even those cited by Petitioner, invoke universally accepted constitutional, statutory or other rights: *Stack v. Boyle, 342 U.S. 1 (1951)*, (violation of criminal defendants statutory and constitutional right to bail); *Abney v. United States, 431 U.S. 651 (1977)*, (adverse ruling on a double jeopardy claim); *Helstoski v. Meanor 442 U.S. 500 (1979)*, (denying immunity under the Speech and Debate Clause); *Nixon v. Fitzgerald, 457 U.S. 731 (1982)*, (denying a civil defendant's motion to dismiss based upon absolute immunity from suit for civil damages arising from actions taken while he was President of the United States); *Mitchell v. Forsyth, 472 U.S. 511 (1985)*, (denying government officials qualified immunity from damages suits); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc., 506 U.S. 139 (1993)*, (stating Eleventh Amendment immunity from suit in federal court may be vindicated by immediate appeal under collateral source doctrine); and *Cohen* itself, where the "claim of right" was the statutorily mandated provision that a plaintiff in a stockholder's derivative action must post security for reasonable

expenses incurred by the defense. The distinction between these fundamental rights and the novel "State's rights" asserted by Petitioner is glaring.

In first announcing the "collateral order" exception, the *Cohen* ruling set forth the standard for "claims of right" by stating as follows: "But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in the final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." 337 U.S. at 546; "We hold this order appealable because it is a final disposition of a claimed right. . . here it is the right to security that presents a serious and unsettled question." *Id. at 546-547.* (Emphasis added). It is therefore clear that Petitioner's specious "claim of right," that the State can demand that it not be forced to undergo "useless federal habeas litigation," is simply not a recognized right by virtue of either the Constitution, statute or any other authority for purposes of invoking the exception to § 1291.

Since the district court's order did not deprive Petitioner of a claimed right, there is no need to apply the *Cohen* test. As stated in *Gulfstream Aerospace Corp. v. Mayacamas Corp. , 806 F.2d 928 (9th Cir. 1986)*: "Before the *Cohen* test will apply, the appellant must show that the district court's erroneous decision will deprive him of some protected interest. (citations omitted). Here, Gulfstream. . .is not deprived of a protected interest. Thus, we do not reach the *Cohen* test, and we find the order nonappealable." *806 F.2d at 930.*

Nonetheless, even assuming arguendo that the State's claim of right is adequate (the State's right not to be subjected to 'unauthorized' habeas proceedings; the State's right not to be forced to litigate an unauthorized habeas petition with its intended delay) this "right" is not "separable from, and collateral to, rights asserted in the action. . .independent of the cause itself," as mandated by

Cohen. On the contrary, the decision whether or not a state must litigate unauthorized habeas claims will actually determine which specific rights may be asserted by the prisoner in the habeas action. Petitioner's argument that it need not litigate unauthorized claims in a habeas petition is not "independent of the cause itself" where the cause is, quite simply, the constitutional claims for relief as set forth in the habeas petition. In other words, if this court was to address the merits of Petitioner's appeal, the result would be an order setting forth the parameters of Respondent's habeas corpus petition, claim by claim. Surely this is not separable from, collateral to, nor independent of the cause itself.

This is in sharp contrast to *Cohen* , where the claim of right was simply the requirement that the plaintiff must post security for reasonable expenses incurred by the defense; this correctly was deemed completely "seperatable from, and collateral to," the issues in the underlying stockholder's derivative action. The same is true for *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, *supra*. There, the district court's order denying a motion to stay or dismiss the action because a similar suit was pending in the State court was similarly considered collateral to the merits of the breach of contract actions themselves that had been filed in both federal and state court. Here, on the other hand, the "claims of right "at issue—which Constitutional claims will comprise Respondent's habeas petition as a result of the state's purported right to not litigate unauthorized claims–are one and the same.

It is for this same reason that Petitioner fails to satisfy prong two of the three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable under § 1291, as set forth in *Coopers & Lybrand v. Livesay*, *supra*. Prong two requires that the order must "resolve an important issue completely separate from the merits of the action." As stated above, the issue here is part and parcel of the merits of the underlying action, namely, which, if any,

constitutional grounds for relief set forth in respondent's habeas corpus petition will be litigated. As such, the order is not appealable under the collateral order exception to § 1291 because it fails to satisfy one of the requirements of the three-pronged test. *Gulfstream Aerospace Corp. v. Mayacamas Corp., supra, 485 U.S. at 275-276.*

In sum, the "collateral order" exception to § 1291 is limited to a "small class" of decisions. *Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546.* This case clearly does not meet the criteria to be included within that class. If Petitioner's argument was to succeed, a flood of collateral order appeals would flow from the frequent cases challenging the authorization of habeas proceedings. Furthermore, Petitioner's fear of widespread relitigating entire cases after a habeas petition has been declared null and void has not materialized, despite the literally thousands of habeas petitions that have been filed. Thus, Petitioner's unrecognized "claim of right" would result in an enormous expansion of the collateral order exception despite being based purely on the unsubstantiated fear that "an authorized habeas petition may later be potentially considered to be void by a federal court." (Petitioner's brief, p. 17) (emphasis added). Petitioner's argument must therefore be rejected.

II

IRRESPECTIVE OF THE APPEALABILITY ISSUE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ACCEPTING THE PETITION FOR WRIT OF HABEAS CORPUS.

Petitioner's blanket assertion that Respondent's habeas corpus petition should be dismissed for lack of verification is also without merit. The district court did not abuse its discretion in accepting the petition as filed. The petition is sufficiently verified, and the district court is

empowered to address its merits even if unverified. Thus, the instant matter is easily distinguished from the cases cited by Petitioner in that Respondent did verify the petition and does want his writ of habeas corpus to go forward. As such, it was not error for the district court to deny Petitioner's motion to dismiss.

A. Even assuming arguendo the petition is not sufficiently authorized, it is well established that a district court has the discretion to address the merits of an unverified petition.

28 U.S.C. § 2242 states, in pertinent part: "Application for a writ of habeas corpus shall be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his behalf." (emphasis added). The requirements of § 2242 have been liberally construed. As the court stated in *Morris v. United States of America 399 F.Supp. 720 (E.D. Va., 1975)*, "In accordance with this policy, the requirements of *28 U.S.C. § 2242* must be tolerantly interpreted with respect to prisoner petitions. . .The petitioner need not demonstrate a physical or mental handicap to justify an agent's signature; other grounds of necessity, as have been alleged here, will suffice (citations omitted). . .Furthermore, a lack of formal 'verification' should not be allowed to defeat prisoners' constitutional claims." *399 F.Supp at 722-723.*

In *Hendricks v. Vasquez , 908 F.2d 490 (9th Cir. 1990)*, respondent Attorney General of the State of California contended that the district court was without jurisdiction to consider Hendrick's petition for writ of habeas corpus because, although the petition was signed by Hendrick's counsel, it was not signed and verified personally as required by Rule 2 of the Rules Governing § 2254 Cases and *28 U.S.C. § 2242*. The court responded to this argument as follows:

> "The respondents cite no authority for the proposition that it is reversible error for the District Court to address the merits of an unverified petition. The District Court may refuse to file, or may dismiss, an unsigned and unverified petition. *In Re: Application of Gibson, 218 F.2d 320 (9th Cir. 1954)* (affirming the District Court's

> refusal to file an unverified petition) (citations omitted). However, the defect is one that the District Court may, if it sees fit, disregard. *Morris v. United States, supra, 399 F.Supp. 720, 723 (E.D. Va. 1975)* (addressing the petitioner's constitutional claim despite the lack of verification); *Cresta v. Eisenstadt 302 F.Supp. 399 (D. Mass. 1969)* (addressing the merits of an unverified petition signed by the petitioner's counsel where the respondent failed to raise the issue); *Lewis v. Connett 291 F.Supp. 583 (W.D. Ark. 1968)* (finding that the petitioner's failure to verify the petition did not preclude the District Court from exercising jurisdiction). Indeed, Rule 2(e) provides that a petition which does not meet Rule 2's requirements "may be returned to the petitioner, if a [District Court] judge. . .so directs." *908 F.2d at 491* (emphasis added).

The district court therefore did not abuse its discretion in accepting the habeas petition and thereby denying the motion to dismiss. As is clear from the record, the factual chronology in this case is long and complicated as it pertains to the verification issue. It was within the district court's sound discretion whether or not to address the merits of the habeas corpus petition, regardless of verification status.

B. Nevertheless, the petition is sufficiently verified.

As noted above, the factual circumstances surrounding this matter are convoluted. However, this much is clear: Respondent verified claims one through fifteen in his petition, Respondent's prior counsel explained at length the circumstances surrounding the verification issue, and Respondent has never renounced his desire and intent to continue with his quest for habeas relief. As the Appendix to Petitioner's writ makes clear, the district court was provided numerous documents pertaining to the factual history behind the verification issue. Based on the inherent power of the district court to address the verification issue, it cannot be said the district court abused its discretion under the facts of this case by finding the petition sufficiently verified.

The facts of this case are easily distinguishable from those in the case principally relied upon by Petitioner, *Deutscher v. Angelone 16 F.3d 981 (9th Cir. 1991)*. In that case, Deutscher's lawyer

confirmed that he filed the petition without notifying Deutscher or seeking his authorization. The lawyer mailed Deutscher a copy of the petition after filing it, but never explained the nature of federal habeas corpus proceedings, the risk that claims not raised might be barred as abuse of the writ, or the appropriateness of having other counsel file the petition. *Deutscher, 16 F.3d at 984.*

Here, on the other hand, the record is clear that Respondent wanted a habeas corpus petition filed on his behalf; he simply had disagreements with his prior counsel regarding the specifics thereof. Thus, this case does not present the situation where counsel was preparing and verifying a petition without the prisoner's knowledge, or otherwise acting as an "intruder or uninvited meddler" as is feared with "next friend" petitions.

Respondent relies on a case 115 years old in order to analogize the instant habeas corpus issues with civil actions wherein the client must commence litigation in order for it to exist. *Ex Parte Tom Tong 108 U.S. 556 (1883).* Even following this holding, it is indisputable that Respondent himself has been very active, and has fully agreed with, the bringing of his habeas corpus petition. His disagreements with prior counsel were analyzed in depth by the district court, by way of points and authorities and declarations. The district court's findings in this regard should not be disturbed as there was clearly no abuse of discretion. Thus, irrespective of the appealability of the district court's ruling, there was no error in accepting the petition and denying the motion to dismiss.

CONCLUSION

The district court's order denying the motion to dismiss is not appealable as a collateral order exception to *28 U.S.C. § 1291.* Furthermore, the district court did not abuse its discretion in

accepting the petition for writ of habeas corpus and denying the motion to dismiss. Thus, it is respectfully requested that the petition for writ of certiorari be denied.

DATED: August 13, 1998.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHEL S. MAGNUSON, Attorney for
Respondent DOUGLAS DANIEL CLARK

DATED: August 13, 1998.

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
Respondent DOUGLAS DANIEL CLARK

Supreme Court, U.S.
FILED
AUG 19 1998
OFFICE OF THE CLERK

No. 97-2024

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF ADVISING COURT OF SUBSEQUENT DECISION BY NINTH CIRCUIT (RULE 15(8) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES)

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	3
THE NINTH CIRCUIT HAS ISSUED TWO NEW PUBLISHED ORDERS REITERATING ITS VIEW THAT THE QUESTION OF WHETHER A HABEAS CORPUS PETITION HAS BEEN "AUTHORIZED" BY A STATE PRISONER IS NOT SUBJECT TO THE COLLATERAL ORDER APPEAL DOCTRINE AND NEED NOT BE RESOLVED PRIOR TO ALL OF THE TIME AND EXPENSE OF LITIGATION	3
CONCLUSION	7

TABLE OF AUTHORITIES

FEDERAL CASES

	Pages
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	4,6
Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	6

DOCKETED CASES

Calderon v. U.S.D.C. (Stansbury). No. 98-70733 (USDC No. CV 95-8532-WMB	4
Robert Edward Stansbury v. Arthur Calderon, No. 98-99004 (USDC No. CV 95-8532-WMB)	4,5,6

STATUTES

28 U.S.C. § 2242	4

COURT RULES

Rules of the Supreme Court of the United States, rule 15	3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
No. 97-2024

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

INTRODUCTION

Petitioner Arthur Calderon hereby files this Supplemental Brief to alert this Honorable Court to two published Orders by the Ninth Circuit, in the case of Robert Edward Stansbury v. Arthur Calderon, No. 98-99004 (USDC No. CV 95-8532-WMB), an appeal case, and in the case of Calderon v. U.S.D.C. (Stansbury), No. 98-70733 (USDC No. CV 95-8532-WMB), a mandamus action. In these Orders, the Ninth Circuit Court of Appeals again, as in the instant case, 1) declined to apply the collateral order appeal doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) to the jurisdictional question of whether litigation can proceed where the state prisoner has actually disavowed a federal petition for writ of habeas corpus filed on behalf of a state prisoner under 28 U.S.C. § 2242, and, in the mandamus action, 2) stated that the question of whether a petition is legitimate at all can easily be determined after all of the time and expense of litigation. The Orders, which are fully discussed below, is attached hereto as Supplemental

Appendices R and S.[1/] The state prisoner's purported verification, wherein he disavows a major portion of that petition, is attached hereto as Supplemental Appendix T.

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1. Petitioner's petition for writ of certiorari was accompanied by an Appendix containing appendices A through Q.

ARGUMENT

THE NINTH CIRCUIT HAS ISSUED TWO NEW PUBLISHED ORDERS REITERATING ITS VIEW THAT THE QUESTION OF WHETHER A HABEAS CORPUS PETITION HAS BEEN "AUTHORIZED" BY A STATE PRISONER IS NOT SUBJECT TO THE COLLATERAL ORDER APPEAL DOCTRINE AND NEED NOT BE RESOLVED BEFORE ALL OF THE TIME AND EXPENSE OF LITIGATION

Rule 15 of the Rules of Court of the Supreme Court of the United States states:

> 8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding in forma pauperis under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

At the time of the filing of the instant petition, the instant case represented the only known instance wherein the Ninth Circuit had ruled that the jurisdictional question of whether a petition for writ of habeas corpus

by a state prisoner filed under 28 U.S.C. §2242 has been properly authorized IS NOT SUBJECT TO the collateral order appeal doctrine.

As petitioner Arthur Calderon stated in his petition for certiorari(hereinafter "Pet."):

> At issue is whether the States can, without awaiting final judgment and appeal, challenge a habeas corpus petition as unauthorized. A State has an interest in the question because if it is forced into lengthy litigation on a petition, and that petition is subsequently declared null and void as being not authorized by the prisoner, the State may have to litigate a new petition, presumably one legitimately authorized by the prisoner. Pet. at 11.

Now, however, the Ninth Circuit has repeated its misstep in the instant case and has, in two published Orders, in the cases of Robert Edward Stansbury v. Arthur Calderon, No. 98-99004 (USDC No. CV 95-8532 WMB), an appeal case, and Calderon v. U.S.D.C. (Stansbury), No. 98-70733 (USDC No. CV 95-8532-WMB), a mandamus action, again ruled that the collateral order appeal doctrine of Cohen does not apply to the question of whether a petition is "authorized" and thus whether any litigation had thereupon will be valid, even where the state prisoner disavows the petition at the outset and also ruled in the mandamus action that there is no reason why the validity of a petition cannot be tested after all the time and expense of litigation.

As is set forth in the petition for certiorari, in the instant case, the counsel for the state prisoner, Clark, procured the prisoner's signature on a verification attached to one petition but filed it with a verification

attached to a petition which, inter alia, added additional claims. The counsel then attached counsel's own verification of the additional claims in the petition, admitting that the prisoner would, in all likelihood, refuse to verify the additional claims. After the Warden filed pleadings alerting the prisoner to what his counsel had done, the prisoner, permitted by the district court to file pleadings on the authorization question, disavowed the entire petition. The district court appointed new counsel for the prisoner but refused the Warden's demand that either a new properly authorized petition be substituted or that the prisoner verify the old petition. The Warden appealed to the Ninth Circuit who issued an ambiguous decision that could have been interpreted as holding that the collateral order appeal doctrine does not apply to an authorization question of this type. See Pet. at 4-8.

In Stansbury, the prisoner expressly approved of and filed a purported verification (although not under oath) of the guilt phase claims contained in his capital case petition for writ of habeas corpus. However, he specifically refused to verify those claims that challenged only the penalty phase of his conviction and stated in the purported verification that it was his wish to be executed if his guilt phase challenges were unsuccessful and therefore he was not authorizing the pursuit of the penalty phase claims in the petition. See Supplemental Appendix T.

The first Order of the Ninth Circuit in Stansbury reads:

> Prisoner Robert Stansbury moves to dismiss the Warden's appeal of the Order of the district court dated February 26, 1998. That order denied the Warden's Motion to Dismiss Stansbury's Petition for Writ of Habeas Corpus.

> The Warden's Motion to Dismiss was based on alleged deficiencies in the verification of the petition. After denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for interlocutory appeal under 28 U.S.C. §1292(b).
>
> The district court's Order denying the motion to dismiss is not a final decision of the district court. It is an interlocutory order and therefore, not subject to immediate appellate review. 28 U.S.C. § 1291. No exception to the final judgment rule, such as the collateral order doctrine, applies. Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Therefore, this court lacks jurisdiction.
>
> Stansbury's Motion to Dismiss the appeal for lack of jurisdiction is granted. APPEAL DISMISSED. Supplemental Appendix R.

The Order in the mandamus action, which was based on the same facts reads:

> Warden Calderon petitions for a writ of mandamus challenging the district court's Order dated February 26, 1998 and seeking dismissal of the habeas proceeding pending in district court. The district court denied the Warden's Motion to Dismiss Stanbury's Petition for Writ of Habeas Corpus based on alleged deficiencies in the verification of the petition. After denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for

interlocutory appeal under 28 U.S.C. §1292(b). Initially, the Warden sought appellate review. However, we dismissed the appeal for lack of jurisdiction. Prior to our dismissal of the appeal, the Warden filed this mandamus action.

A petition for writ of mandamus pursuant to 28 U.S.C. §1651 is an extraordinary writ. We consider five guidelines to determine whether to grant mandamus relief: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable onappeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of law of first impression. Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir.1977).

The Warden's petition does not meet these factors. There is no indication that the issue cannot be raised on direct appeal after the habeas petition proceeds through district court. In addition, the Warden has not established that the district court's order is clearly erroneous, an oft-repeated error or that it raises new and important problems that should be considered outside of the normal appeal process. Thus, mandamus is not appropriate in this case.

PETITION FOR WRIT OF MANDAMUS DENIED.

As such, whereas the instant case once stood alone, it is now clear that the Ninth Circuit Court of Appeals has taken the position, in yet another case, the collateral order appeal in Stansbury, that even where the basic validity of the petition is at issue, an appeal complaining that the district court lacks jurisdiction to entertain an "unauthorized" petition is too premature to satisfy the collateral order appeal doctrine of Cohen.

Moreover, although the Warden, the petitioner in the instant case, did not appeal the denial of his mandamus action as to Clark, the wording of the Ninth Circuit in denying the mandamus action in Stansbury reiterates, eludicates and leaves no doubt as to the reasoning process in which the Ninth Circuit engaged in denying the collateral order appeals in Clark and Stansbury. It clearly states, chillingly, that there is no reason why the parties should be allowed to litigate the validity of a habeas petition before they go through the time and expense of a civil action.[2/]

---

2. In so doing, they ignore the language of the second prong in Bauman, their own case, that mandamus may be proper where the mandamus seeker will be damaged in a manner not correctable on appeal.

CONCLUSION

For the aforestated reasons, the Warden respectfully prays that the petition for certiorari be granted and, after a hearing or by a *per curiam* decision, the Court of Appeals for the Ninth Circuit be ordered to reinstate the collateral order appeal or, if this Court finds that the Ninth Circuit decision was on the merits, this Court grant a hearing to determine whether a petition can be "authorized" where an indigent state prisoner so objects to part of its contents that he disavows it.

Dated: August 19, 1998.

Respectfully submitted,

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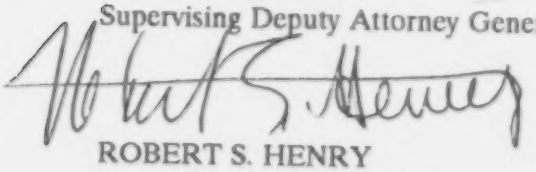

ROBERT S. HENRY
Deputy Attorney General
Counsel of Record

Counsel for PETITIONER

SUPPLEMENTAL APPENDIX R

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EDWARD STANSBURY,	No. 98-99004
Petitioner-Appellee,	D.C.No.CV 95-8532-WMB
v.	
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	ORDER
Respondent-Appellant	

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, District Judge, Presiding
Filed August 5, 1998

Before: Chief Judge HUG, FARRIS and SILVERMAN, Circuit Judges.

Prisoner Robert Stansbury moves to dismiss the Warden's appeal of the Order dated February 26, 1998. That order denied the Warden's Motion to Dismiss Stanbury's Petition for Writ of Habeas Corpus. The Warden's Motion to Dismiss was based on alleged deficiencies in the verification of the petition. After

denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for interlocutory appeal under 28 U.S.C. § 1292(b).

The district court's Order denying the motion to dismiss is not a final decision of the district court. It is an interlocutory order and therefore, not subject to immediate appellate review. 28 U.S.C. § 1291. No exception to the final judgment rule, such as the collateral order doctrine, applies. Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Cohen v. Beneficial Indus. Loan Corp., 337 U.s. 541 (1949). Therefore, this court lacks jurisdiction.

Stansbury's Motion to Dismiss the appeal for lack of jurisdiction is granted. APPEAL DISMISSED.

COUNSEL

Paul M. Roadarmel, Jr., Deputy Attorney General, Los Angeles, California for the respondent-appellant.

Harry Simon, Deputy Federal Public Defender, Los Angeles, California for the petitioner-appellee.

SUPPLEMENTAL APPENDIX S

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, Warden of the California State Prison at San Quentin, *Petitioner*,	]	No. 98-70733
v.	]	D.C. No.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent*,	>	CV 95-8532-WMB
	]	**ORDER**
ROBERT EDWARD STANSBURY, *Real Party in Interest.*	]	

Petition for Writ of Mandamus to the
United States District Court
for the Central District of California
William Matthew Byrne, District Judge, Presiding

Filed August 13, 1998

Before: Procter Hug, Jr., Chief Judge, Jerome Farris and Barry G. Silverman, Circuit Judges.

COUNSEL

Paul M. Roadarmel, Jr., Deputy Attorney General for the State of California, Los Angeles, California, for the petitioner.

ORDER

Warden Calderon petitions for a writ of mandamus challenging the district court's Order dated February 26, 1998 and

seeking dismissal of the habeas proceeding pending in district court. The district court denied the Warden's Motion to Dismiss Stanbury's Petition for Writ of Habeas Corpus based on alleged deficiencies in the verification of the petition. After denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for interlocutory appeal under 28 U.S.C. §1292(b). Initially, the Warden sought appellate review. However, we dismissed the appeal for lack of jurisdiction. Prior to our dismissal of the appeal, the Warden filed this mandamus action.

A petition for writ of mandamus pursuant to 28 U.S.C. §1651 is an extraordinary writ. We consider five guidelines to determine whether to grant mandamus relief: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of law of first impression. *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977).

The Warden's petition does not meet these factors. There is no indication that the issue cannot be raised on direct appeal after the habeas petition proceeds through district court. In addition, the Warden has not established that the district court' s order is clearly erroneous, an oft-repeated error or that it raises new and important problems that should be considered outside of the normal appeal process. Thus, mandamus is not appropriate in this case.

PETITION FOR WRIT OF MANDAMUS DENIED.

SUPPLEMENTAL APPENDIX T

DECLARATION OF ROBERT E. STANSBURY

I, Robert E. Stansbury, declare as follows:

I have received the Amended Federal Habeas Corpus Petition that my attorneys have represented to me they will be filing on my behalf. I authorize my attorneys to proceed on the guilt phase claims contained in my Amended Petition. I refuse penalty phase relief, and I want such relief barred since I do not want a "Life Without Possibility of Parole" sentence. I reserve the right to end the appeal at any time and seek the death penalty.

/S/
ROBERT E. STANSBURY

No. 97-2024

FILED
AUG 25 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
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(CAPITAL CASE)

QUESTION PRESENTED

1. IS THE RULING OF A DISTRICT COURT ON WHETHER A STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF HAS AUTHORIZED A HABEAS CORPUS PETITION SUBJECT TO THE "COLLATERAL ORDER" APPEAL DOCTRINE IN COHEN V. BENEFICIAL LOAN CORP., 337 U.S. 541 (1949)?

2. IS SUCH A PETITION AUTHORIZED UNDER 28 U.S.C. § 2242 WHERE THE PRISONER DISAVOWS IT?

LIST OF PARTIES

1. Arthur Calderon, Warden of the California State Prison at San Quentin, Petitioner.

2. Douglas Daniel Clark, Respondent.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. AN ORDER DETERMINING WHETHER A STATE HABEAS CORPUS PETITION IS VALID IS IMMEDIATELY APPEALABLE	2
II. THE ISSUE HERE IS NOT MERELY SOME PETTY DISAGREEMENT ABOUT THE VERIFICATION BUT INSTEAD IS ABOUT WHETHER THE PETITIONER HAS DISAVOWED THE PETITION	6
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949)	2,3
Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991)	5,7,8,9
Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	2,3,4,5
Demarest v. James, 498 U.S. 184, 111 C. Ct. 599, 112 L. Ed. 2d 608 (1991)	9
DOCKETED CASES	
Calderon v. U.S.D.C. (Stansbury), filed August 13, 1998, in No. 98-70733 (9th Cir. 1998)	5
Robert Edward Stansbury v. Arthur Calderon, filed August 13, 1998, in No. 98-70733 (9th Cir. 1998)	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
No. 97-2024

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

INTRODUCTION

In his "Brief in Opposition" (hereinafter "Opposition" cited as "Opp.") to the Warden's "Petition for Writ of Certiorari" (hereinafter "Petition" cited as "Pet.," Clark attempts to minimize the import of this case by mischaracterizing the dispute as being a minor technical one over the whether the verification was proper. To the contrary, the state prisoner has disavowed the petition and the question is whether the petition is legitimate at all. As quoted more fully below, the state prisoner announced, in a court-solicited *pro se* pleading that he "totally rejects as false, fraudulent, and perjurious the [petition and other document counsel] caused to be filed over my sworn verification." The Opposition also attempts the impossible task of arguing that the collateral order appeal doctrine is not appropriate to resolve the question of the legitimacy of a habeas corpus petition. However, the Opposition addresses the latter point first and the former point last. Although this is confusing, in the interests of not further confusing matters, the Warden will do likewise.

ARGUMENT

I.

AN ORDER DETERMINING WHETHER A STATE HABEAS CORPUS PETITION IS VALID IS IMMEDIATELY APPEALABLE

The Opposition seeks to first convince this Honorable Court that the collateral order appeal doctrine in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) should not apply to the dispute here. He maintains this position by an erroneous reading of Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988).

The Opposition, relying on Gulfstream, erroneously asserts that the Cohen doctrine does not apply unless the appealed order deprived the would be appellant of a right guaranteed by legislation, either statutory or constitutional. Opp. at 5. This is flatly wrong. Gulfstream never stated that a prerequisite to the application of the Cohen doctrine was the existence of a legislative "right." Indeed, the Opposition's cite of Gulfstream for that proposition only refers back to language in Cohen itself that a decision is appealable if it determines "claims of right" apart from the merits of the action. However, nothing in that language expressly limits the collateral order appeal doctrine to cases, such as Cohen which do involve legislatively granted rights.

To the contrary, the three part test in Gulfstream focuses on disputes, questions and issues. As the opposition recites, the first part of the test is whether the order appealed "conclusively determine[s] the disputed question." The second part of the test is whether the

order appealed resolves an "important issue completely separate from the merits of the action." Lastly, the third part of the test is whether the order appealed is "effectively unreviewable on appeal." Opp. at 4. None of these tests involve the existence of any statutory or constitutional "right." As such, the Opposition is wrong in its misguided belief that the petition should be rejected because there is no provision of law protecting any statutory or constitutional "right" sought to be vindicated here.

Petitioner attempts to argue that the State's right not to be forced to defend an invalid petition is 1) not a claim of right recognized by Cohen, and 2) not as important as other rights recognized in other collateral order appeal cases. The Warden has already disposed of the first contention. The second proposition, that the State's interest in not having to litigate an invalid petition is not important, requires no argument to dismiss.

As to the first part of the Gulfstream test, finality, here, the district court's order conclusively determined and resolved the "authorization" question. The Order found the petition to be authorized and that ended the subject excepting appeal. That decision was not temporary, it was final. For any further hearing, the Warden must look to the appeal. The only question is whether that appeal should be now or later.

The Ninth Circuit opinion and the Opposition here erroneously interprets this part of the Gulfstream test as whether or not the losing party will ever get another chance to litigate the question. This is clearly wrong. The reason for this part of the Gulfstream test is to assure that the appellate court will not review, on appeal, a decision which is only temporary in the eyes of the district court and one that was not even meant to be the last word on

the subject at the district court level. The rule does not demand, as a prerequisite to appellate review, that the order be the last word on the subject for all time. Obviously, the district court has the power to issue few orders that are unreviewable. The position of the Ninth Circuit and the Opposition is, therefore, not only erroneous but frivolous.

Next, Gulfstream requires that the appealed order resolve a question "separate from the merits of the action." The Opposition surprisingly challenges this step. Incredibly, it maintains, in doublespeak, that if certiorari is granted, "the result would be an order setting forth the parameters of . . . [the] petition [below], claim by claim. Surely this is not separable from, collateral to, nor independent of the cause itself." Opp. at 7.

This part of the Gulfstream test simply asks whether the order involves the merits of the dispute. If it does, then, like the other merits of the action, it can be reviewed in the regular course of a normal appeal. If it does not, and the other parts of the test are satisfied, then a collateral order appeal will lie.

Whether the petition is "authorized" has nothing to do with the merits of the petition. The merits of the petition are the validity, or lack thereof, of the claims inside the petition. All of the claims in the petition filed in district court on behalf of the petitioner could be meritorious, yet, it is the Warden's position, if the petition is unauthorized, instead of determining the merits of those claims, the petition should be either dismissed or changed to become authorized. Since dismissal is a grave result, it follows that the issue is also an "important" one.

Conversely, even if all of the claims in the petition lack merit, the state prisoner still has the right to

proceed with the litigation through final judgment, if the petition is authorized. As such, the authorization question has nothing to do with the merits of the claims because a fully meritorious petition cannot be heard if unauthorized and even a completely unmeritorious petition must be heard if authorized. As such, the decision decided an issue "separate from" the merits of the petition and the second test was satisfied.

Lastly, the Opposition does not even venture forth to argue that the third part of the Gulfstream test is not satisfied. Nor can it. The third part asks whether the Order appealed from is "effectively unreviewable" on appeal. If it is, then the collateral appeal doctrine will apply. Here, without question, it is. Once, the judgment is entered, the Warden will have already undergone all the time and expense of litigation. If the petition is then found to be "unauthorized" on appeal, there would be no way the State could ever recoup that lost time and expense. In addition, there might be the "double whammy" that occurred in Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991) should the prisoner then be allowed to file a new "authorized" petition, which the Warden would have to expend additional time and resources defending against.

Incredibly, although even the Opposition itself does not challenge this unchallengeable point, the contrary position seems to be the very basis of the decision of the Ninth Circuit. In the Warden's recently filed "Supplemental Brief Advising Court of Subsequent Decision by the Ninth Circuit," he pointed out that in the cases of Calderon v. U.S.D.C. (Stansbury), filed August 13, 1998, in No. 98-70733 (9th Cir. 1998) and Robert Edward Stansbury v. Arthur Calderon, filed August 5, 1998, in No. 98-99004 (9th Cir. 1998), related cases that are nearly identical to the instant case, the Ninth Circuit boldly

advanced its opinion that where the question of whether the petition is validly authorized is in doubt, "There is no indication that the issue cannot be raised on direct appeal after the habeas petition proceeds through district court." See Supplemental Appendix S. This is an astounding proposition[1/] that begs certiorari review.

II.

THE ISSUE HERE IS NOT MERELY SOME PETTY DISAGREEMENT ABOUT THE VERIFICATION BUT INSTEAD IS ABOUT WHETHER THE PETITIONER HAS DISAVOWED THE PETITION

Petitioner mischaracterizes the dispute below attempting to minimize it to the point where it merely concerns a defective verification. This is patently false. The dispute involves a dispute over authorization. As shown in the petition, after being permitted by the district court judge to file his own *pro se* pleadings on the authorization issue, petitioner not only filed a document entitled "Petitioner's Actual Opposition to Fujioka's Perjurious Documents filed April 23 (the petition itself) And June 16, 1997 (the counsel's opposition to the Warden's motion to dismiss as unauthorized)," but also stated clearly, in the first sentence, "PETITIONER totally rejects a false, fraudulent and perjurious the documents Fred Fujioka caused to be filed over my sworn verification April 24, 1997, and the totally misleading and false claims in his filing in behalf of 'Petitioner' but without my

---

1. In fact, the Warden maintains that a proper authorization goes to the jurisdiction of a federal court to entertain a habeas corpus petition.

knowledge, approval or consent, on JUNE 16, 1997." See Appendix G, caps in original.

Unlike the case here, a verification dispute has to do, like in the cases cited by the Opposition, with a missing signature, a deficiency in the Oath, or some other technical complaint, that can easily be remedied without rendering the ensuing litigation a legal nullity. This is far more serious than some technical deficiency in a pleading.

As such, since the Opposition has either misstated or misinterpreted the issue, all of its argument in section A of the second argument, relating to cases dealing with technical deficiencies in the verification, are inapposite and inappropriate to respond to in this context. Opp. at 8-10.

Moving to section B of argument II, it can be seen that the Opposition there attempts to advance the proposition that the petition is, in any case, "sufficiently verified." As stated above, this is not a "verification" issue but an "authorization" issue and the Warden will only address the arguments in section B insofar as they are relevant to "authorization."

First, the Opposition attempts to distinguish this case from Deutscher on the grounds that there the counsel filed the habeas petition without the client's notification or authorization. However, as Appendix G demonstrates, the prisoner's counsel in the instant case may have done even worse. It is undisputed that he filed the petition without the prisoner's "knowledge, approval or consent," thus at least matching the error in Deutshcer. Moreover, if the prisoner is correct, counsel additionally fraudulently attached the prisoner's verification to a document for which counsel knew the verification was not

intended. Thus, the petition here was far less "authorized" than in Deutscher.

Moreover, present here but lacking in Deutscher, the prisoner has, before commencement of litigation, filed a document, at the district court's request, specifically disavowing the petition and, even objecting to his counsel's pleading opposing the Warden's motion to dismiss on the very ground of lack of authorization. If this is not lack of authorization, then there is no such thing.

Next, the Opposition points out that the state prisoner here "wanted a habeas corpus petition filed on his behalf . . .." Opp. at 11. That is irrelevant because such was also the case in Deutscher. The basis of the Deutscher decision was not, in any part, based on the fact that the prisoner there eschewed habeas relief because he did not. Indeed the Deutscher case was brought to clear the way for the bringing of a new habeas petition by that prisoner on the grounds that it would not be second or successive because the prior petition had not been "authorized."

The Opposition next argues that the prisoner "simply had disagreements with his prior counsel. . .." Opp. at 11. Despite the fact that this characterization is like calling the Civil War a "disagreement" between the States, the fact remains that, as shown above, the prisoner disavowed the petition. One might ask why, if the prisoner does not accept the petition, why should the State be forced to defend against it.

The Opposition next attempts to advance the argument of the district court that the petition is valid because counsel was not acting as an "intermeddler" (Appendix C). Opp. at 11. It does not matter. The state prisoner had the right to control the contents of the

petition. His attorney had only as much authority as the state prisoner desired to surrender. Where the state prisoner was so dissatisfied with the petition that he disavowed it and deemed it unauthorized, the fact that the counsel was not an "interloper" was of no import. The petition was still unauthorized and thus invalid.

Lastly, the Opposition attempts to insinuate into the discourse evidence outside of the record when he argues that the prisoner has, since the time the Order appealed from was litigated in the district court, "been very active, and has fully agreed with, the bringing of his habeas corpus petition." Respondent cannot raise matters on certiorari review which have not been raised below. Demarest v. James, 498 U.S. 184, 189, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991).

However, while attempting to so prejudice this certiorari review in this manner, the Opposition fails to realize that its own argument can be turned against itself as one notes the glaring absence from the district court record, for all of the alleged "new" cooperation of the prisoner, of any "new" verification or authorization of the petition. In other words, the prisoner has still not "authorized" this petition. The prisoner's last words remain that he disavows the petition. If this petition is denied on its merits, the prisoner, who the California Supreme Court called "someone with [a] history of manipulative . . . conduct" (People v. Clark, 3 Cal. 4th 41, 96, 833 P.2d 561, 10 Cal. Rptr. 2d 554 (1992)) can still "have his cake and eat it too" by simply announcing that he had never authorized the petition as he had made clear from the outset and should be, as in Deutscher, entitled to litigate a new one. As such, the Opposition's vague and improper hints that "all is now well" should not be utilized as a basis for denying certiorari review.

CONCLUSION

For the aforestated reasons, the Warden respectfully prays that the petition for certiorari be granted and, after a hearing or by a *per curiam* decision, the Court of Appeals for the Ninth Circuit be ordered to reinstate the collateral order appeal or, if this Court finds that the Ninth Circuit decision was on the merits, this Court grant a hearing to determine whether a petition can be "authorized" where an indigent state prisoner so objects to part of its contents that he disavows it.

Dated: August 21, 1998.

Respectfully submitted,

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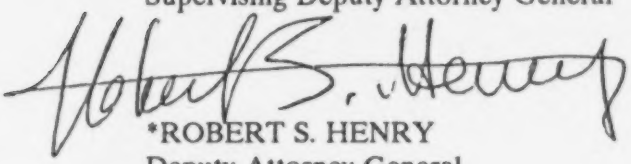

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EDITOR'S NOTE

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Supreme Court, U.S.
FILED
AUG 31 1998
CLERK

No. 97-2024

DISTRIBUTED
SEP 17 1998

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

Arthur Calderon, Warden, Calif. State Prison at San Quentin,

Petitioner,

v.

Douglas Clark, Respondent.

Reply to Petition for Certiorari

Respondent's ACTUAL added response.

Douglas Clark
Respondent
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No phone

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SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997
No. 97-2024

Arthur Calderon, Warden, Calif. State Prison at San Quentin, CA.
Petitioner,

v.

Douglas Clark,
Respondent.

Introduction

Petitioner has sought this petition in an effort to try to hogtie the Respondent into the four corners of a blatantly incomplete and incompetent, and fully protested, writ of habeas corpus.

Counsel (initial) merely xeroxed a few issues from the state DIRECT APPEAL, and since no state writ was ever filed, that is all that was filed in a rush to beat the clock, on the new rules regarding filing deadlines on writs of habeas corpus.

The claim the Petitioner seeks resolved by the nation's highest court is not even close to RIPE for adjudication beyond the trial/district court.

1) The ~~Respondent~~ PETITIONER is aware that when Respondent initiated discourse with the federal courts following a ruling on what the state purported to be a "direct appeal" in my name, I filed TWO instant challenges to U.S. DISTRICT COURT JURISDICTION, neither of which has been addressed.

2) Petitioner is well aware that EITHER of these two issues, known to him personally and to the State Attorney General, for over ten years, can and will simply ELIMINATE JURISDICTION for this instant matter in the federal court.

The ISSUES which ELIMINATE ripeness and thus standing to seek this Court's review:

1) The State of California has created a unique "executive branch" law firm under direct political whim and control of the GOVERNOR of the state. He fired MY LAWYER, (Quinn Denvir) and hired in his place two PROSECUTORS, who then BLOCKED my access to the STATE POST CONVICTION REMEDIES, waived STATE WRIT of HABEAS CORPUS over my protests, and because FARETTA is VOID for CONDEMNED PRISONERS, waived key issues in the DIRECT APPEAL which tended to 'embarrass' the boss, the GOVERNOR, and his EXECUTIVE BRANCH. The total and abysmal conflict of interest led to NO writ, and no direct appeal, at the state level. THUS, this court and the District Court has no jurisdiction to hear ISSUES in a HABEAS CORPUS writ, as supposedly 'filed' but not fully verified.

2) The state has decided that the 6th article of the Constitution of the United States does not apply in this state, when it comes to "non-judge executive branch appointees" sitting as JUSTICES of the California Supreme Court. The state and federal constitutions require judges be ACTUAL JUDGES or a waiver be obtained, in such instances. The state court ignored my many protests, and FIVE of SEVEN justices were PRO TEM's, three RETIRED before ever being "confirmed."

As such, it is obvious that if either filed and undecided JURISDICTIONAL ISSUE carries as defined, there has been NO DIRECT or COLLATERAL state remedy available nor presented to any state court. In light of that UNDECIDED status on two such enormous and widespread flaws in the state's billion dollar death penalty program of post conviction remedies, one would surely not want to get the cart this far before the horses. If the issues (either or both) carry, in the DISTRICT COURT, there CAN BE NO FULL WRIT OF HABEAS CORPUS to file, much less to debate full or partial verification of the parts.

To lift a part of his brief, I will argue that for the state to entertain lengthy proceedings that all may be presented on a sand foundation, which can be washed away with ONE of EITHER of TWO huge pending waves, would be silly, costly, and futile.

I sincerely urge this Honorable Court to place this case back into the DISTRICT COURT, with instructions to DO NOTHING ELSE prior to holding any required hearings and briefings on the two issues (State defender as a pawn of the governor; and pro tem unwaivered justices at the high court) so as to THEN render this matter "ripe". I am going to do everything in my power to NEUTRALIZE any QUESTION, in this matter, by supplanting the ENTIRE sham writ petition with a REAL ONE, if and when JURISDICTION is finally decided based upon a hearing on the two FIRST FILED ISSUES I raised pro se in the District Court.

CONCLUSION.

There are serious JURISDICTIONAL ISSUES as yet unresolved by the District Court. UNTIL standing is affirmed following DECISION of these two challenges filed in 1992, the U.S. Supreme Court's own RULES preclude a grant of a petition on this matter. If it ever becomes ripe, which it surely will NOT, then the Warden will have his day to climb this ladder and knock upon this Court's Door, with proper standing.

Respectfully submitted, this 26th day of August, 1998.

Douglas Clark,
Respondent.
Pro se.